

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,616

837

PAUL V. FINEGAN,

Appellant,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY
a corporation, and

MUTUAL INSURANCE AGENCY, INC.,
a corporation, and

JOHN H. KROLL,

Appellees.

Appeal From the United States District Court
For the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

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(i)

STATEMENT OF QUESTIONS PRESENTED

1. Is a Farmer's Comprehensive Personal Liability Policy of insurance, a contract of indemnity thereby giving the assured the right of action against the insurer when the assured's liability has been determined by judgment or the payment of the judgment against him?

2. Under Maryland law, is an assured deemed negligent if he does not fully read and understand his policy of insurance if there is no positive duty for him to do so?

3. Under Maryland law, must an insurer, to exclude a particular type of personal liability from a comprehensive policy, do so clearly and unequivocally; and under such a policy to determine whether an ambiguity exists, must the policy be construed as a whole?

4. Does the statute of limitations start to run and/or the doctrine of laches begin to apply under legal and equitable remedies under a policy of insurance from:

(a) The time that the policy was disclaimed by the insurer?

(b) The time that the assured was injured by the breach or inequitable conduct of the insurer?

5. In an action for breach of contract, reformation and negligence brought by the appellant against the appellee, is it proper for the court below to grant Summary Judgment for the appellees when the pleadings, exhibits and depositions show there are genuine issues as to material facts in the case?

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JOHN H. KROLL,

Appellee.

Appeal From the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment for the appellees entered upon oral Motions for Summary Judgment in the United States District Court for the District of Columbia. Jurisdiction of this Court is evolved under Title 28 United States Code Annotated #1291.

STATEMENT OF THE CASE

On January 12, 1960, the plaintiff, Paul V. Finegan, filed an action in three counts in the United States District Court for the District of Columbia against the defendants, the Lumbermens Mutual Casualty Company (hereinafter referred to as the Insurer), the Mutual Insurance Agency, Inc. (hereinafter referred to as the Agency) and John H. Kroll: one count was for reformation of the insurance policy, one count for breach of the contract of insurance and one count for negligence. He sued the Insurer as the maker and promissor of the contract of insurance and as the principal of the other two defendants, the Agency as the principal of the defendant Kroll and as the agent of the Insurer; he sued Kroll as an officer and agent of the Agency and as agent of the Insurer and individually. (Complaint, J.A. 1-16)

In February and March, 1960, the plaintiff, a government employee, purchased two large farms in Montgomery County, Maryland, with a total acreage of 376 acres for farm No. 1, and 20 acres for farm No. 2. (J.A. 36, 52) This was the first time that the plaintiff had owned or operated a farm. The farms were operated by the plaintiff as general purpose farms including the growing of grain, hay and the raising of beef cattle, but no dairy operation. (J.A. 36, 37)

Shortly after acquiring the two farms, the plaintiff contacted the defendant Kroll, his insurance agent whom he had dealt with for 20 years, and asked about placing insurance policies on the farm buildings, vehicles and farm residence. The plaintiff had dealt with Mr. Kroll as his insurance representative for about 20 years and in that time he had purchased over 37 policies from him. (J.A. 35, 53) He at all times dealt with Kroll in good faith and by telephone. (J.A. 36, 54) During the phone conversation with Kroll, it was suggested by Kroll, and not Finegan, that he ought to have a Farm Liability policy like "the other farmers are carrying." (J.A. 35, 36) As a result of phone conversations with Kroll, the plaintiff was sent several policies with premiums in excess of \$500.00.

Among the policies ordered over the phone and recommended by Kroll was a Lumbermens Mutual Casualty Company Farmers Comprehensive Personal Liability Policy No. L 349,795 covering the plaintiff's 396 acre farm with the total coverage in the amount of \$25,000.00. The policy sued upon herein is the second renewal of the same and is identical except the plaintiff, having sold his large farm, notified his broker Kroll and the policy sued upon only lists 35 acres instead of his original 396 acres. (J. A. 13-16) Several days after the phone conversations, many policies were mailed to the plaintiff; the plaintiff did not read the policies beyond identifying them as auto, fire or liability policies, he relied upon the statements of Kroll based upon his 20 years of good faith and fair dealing as a skilled insurance adviser.

The Farmer's Comprehensive Personal Liability policy is that which is generally used by farmers to obtain protection in a farm operation.¹ As an insuring agreement, the policy states:

"1. Coverage A— Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof." (J.A. 13)

It also contained the usual medical payment provision and the defense or settlement provision: Insuring agreement II. (a)

"defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages etc." (J.A. 13)

The policy defines a farm employee under Insuring Agreement IV (c):

"Farm Employee. 'Farm Employee' means an employee of an insured whose duties are incidental to the ownership, maintenance or use of the farm

¹ The State of Maryland does not require that farm employees be covered by workmen's compensation insurance but a farmer may voluntarily obtain similar protection through a Farmer's Compensation policy.

premises, including the maintenance or use of automobiles or teams." (J.A. 13)

The original Farmer's Comprehensive Personal Liability policy was renewed for the period April 3, 1954 to April 3, 1955, and renewed a second time for the period April 3, 1955 to April 3, 1956. The policies were renewed automatically and without even a telephone conversation.

On or about January 2, 1956, one John Nicholson, a farm employee of the plaintiff, was seriously injured as a result of an accident (J.A. 56) while engaged in working as a farm employee of the plaintiff. The said accident was immediately reported to Kroll and the other defendants. On January 16, 1956 the Insurer wrote a letter to the plaintiff disclaiming coverage, stating that the reason was:

"—a farm employee is not afforded coverage while engaged in the employment of the insured unless farm employee is specifically declared in this policy. In this instance your employee is not declared." (J.A. 20, Deft's. Exh. A)

The plaintiff in an effort to mitigate his damage paid the medical and hospital bill of the young farm worker in an amount in excess of \$1,236.00 (J.A. 46, 47, pretrial proceedings). Notwithstanding that fact, the farmer worker through his father and next friend sued the plaintiff in the Circuit Court, Montgomery County, Maryland (case No. Law 7546) on or about March 17, 1958 in tort for personal injuries resulting from the farm accident. Copies of the complaint were taken in hand to the defendant Kroll and to the Agency. The Insurer still would not defend. Said suit was in the amount of \$90,000.00. Mr. Finegan hired a Maryland attorney, Joseph Simpson, Esquire, and paid him \$875.00 for his professional services. The action against Finegan terminated in a consent judgment in the amount of \$10,000.00 against Finegan, the amount to be paid over a period of 13 months. Said judgment was finally paid on December 22, 1959. (J.A. 48, 65)

On November 12, 1956, the plaintiff herein sued the defendant Insurer in the Circuit Court, Montgomery County, Maryland (case Law No. 5982) on the contract of insurance but a Demurrer was sustained in favor of the defendant insurance company but without prejudice to the plaintiff because the action was determined to be premature, no judgment having been paid by the insured. An amended action was then filed by plaintiff seeking only the medical payment (\$250.00) benefit; this was dismissed without prejudice on January 13, 1960. The action below was filed January 12, 1960.

Plaintiff's complaint alleges that defendant Kroll as agent and officer of the defendant Agency represented to plaintiff that he would give him full liability protection concerning the operation of his newly acquired farms, that he dealt with Kroll in good faith as an experienced insurance adviser as he had done for 20 years; that the defendant Agency is an agent of the defendant Insurer. That the policy of insurance was breached as written, and as reformed when the Insurer refused to defend, investigate, settle and defend the suit against him by the farm worker causing him to suffer damages as stated above. He also alleges that Kroll was negligent in failing to follow the custom and usages of the insurance trade in not sending him an application and in failing to inspect the new farms to properly determine the insurance needs and in dealing by telephone to place such a complicated policy, that it was the understanding of plaintiff and Kroll that he was being fully protected "like the other farmers," that Kroll and the other defendants knew or should have known that the plaintiff's 396 acre farm would require many farm workers, particularly at harvest time, that the defendants failed to properly set out or exclude the coverage in the policy, that the defendants have waived or are estopped from asserting their defenses in failing to use the inspection and audit provision of the policy, at any time during the policy period or three years after expiration, as set out in the policy. (J.A. 4-10, 45, 46)

The defendant Insurer answered that the coverage for farm employees is not covered because it was not specifically declared in the policy, that Kroll is not an agent of the Insurer, denies any mutual mistake in placing the coverage and asserts that the plaintiff was negligent or contributory negligent. It also alleges that plaintiff's claim is barred by the defense of laches and the statute of limitations. (J.A. 39-43, 47, 48, 49)

The defendant Kroll and defendant Agency in their answers admit that Kroll is the President of the defendant Agency and that the Agency is an agent for the Insurer but deny any negligence, breach of contract or right of reformation, and further allege that plaintiff's action is barred by laches or the statute of limitations. (J.A. 17, 18, 49, 50)

On October 25, 1960 all defendants filed Motions for Summary Judgment alleging that the claim of the plaintiff was not covered in the policy and that relief was barred by the statute of limitations. (J.A. 23, 25) Said motions were denied on January 23, 1961 by the Court below. All defendants renewed and again argued their Motions for Summary Judgment; again they were denied by the Court below. (J.A. 39)

The trial of the action herein was started January 23, 1963 and the plaintiff made his opening statement. (J.A. 52-64) With no further proceedings, argument or evidence, the defendants made their third Motion for Summary Judgment and also made Motions for a Directed Verdict (both oral). (J.A. 64)

On January 29, 1963 the Court below declared a mistrial and granted defendants' Motions for Summary Judgment. (J.A. 69-73)
This appeal follows.

PROCEDURE RULE INVOLVED

Rule 56 Summary Judgment

"(c) Motions in proceedings thereon—the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" Rule 56 (c) 28 U.S.C.A.

STATEMENT OF POINTS

1. The District Court below erred in granting the Motions for Summary Judgment because there were genuine issues of material fact before the court which were not resolved by the incomplete and meager evidence presented by the appellees.

2. It was error to grant the Motions for Summary Judgment on the same evidence upon which the trial court twice before denied such relief.

3. The trial court erred in granting the Motions for Summary Judgment when there was no evidence to rebut appellant's allegations that:

(a) He was covered by the insurance that would be usual for a farm comprehensive policy, that the customs and usages of the trade make it impossible to declare farm employees on a policy until the end of the farm year.

(b) That unfilled spaces in the policy declarations do not exclude specified coverage such as farm employee coverage.

(c) That the insured's failure to read and fully understand his coverage in a detailed policy does not amount to negligence as a matter of law.

(d) That the insured's failure to read and understand his policy when he has been assured by the insurer's proper agent that he is fully covered in a farm operation does not negate the duty of good faith and care due the insured by the insurer's agent who represents himself to be an expert in insurance matters.

(e) In cases of dispute, the meaning of a policy is to be determined from reading it as a whole and interpreting all dubious inferences therein in favor of the insured and not the insurer.

(f) That it is negligence to sell a comprehensive farm policy for the first time without using a written application and without inspecting the farm to determine the farmer's insurance needs. It is negligence to sell such a policy by telephone.

(e) That the defendants waived any defenses to claim lack of coverage when they failed to take advantage of the policy provision to inspect and audit the farm operation during the policy period or within three years after the termination of coverage, and that, as such, constituted a waiver of the Insurer's rights.

4. The trial court erred in determining that laches and the statute of limitations barred the relief prayed for in Count II (reformation) and Count III (negligence) of the Complaint and in granting Summary Judgments against appellant on said counts.

SUMMARY OF ARGUMENT

1. The appellant by his complaint, pleadings, depositions, exhibits and opening statement, raised genuine issues as to material facts, among them as follows:

(a) The custom and usages for the Maryland insurance trade do not list farm employees on the declarations of a farm liability policy until the policy period is concluded because only then does the farmer and the insurer know the number of employees, if any.

(b) A blank space on the declaration (face) of a policy does not mean that coverage is excluded because the coverage is to be determined from the policy as a whole and from all the existing circumstances; this is particularly true in an "all risk" or comprehensive liability policy.

(c) An inspection and audit provision in a comprehensive policy is for the protection of the insurer, and if the insurer voluntarily relinquishes such right, the insurer has waived such protection and is estopped from denying the scope of the insured's business operation and need for insurance protection.

2. In Maryland, a contract of liability insurance is one for indemnity, and as such, no action can be taken against the insurer until the liability of the insured has been finally determined and discharged by payment or satisfaction. Thus, any cause of action by the insured, legal or equitable, first accrues when the insured has paid or satisfied the final determination of liability against him. When there are concurrent legal and equitable remedies, equity will follow the law to determine whether the statute of limitations or the doctrine of laches preclude the actions.

ARGUMENT

I

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENTS WHEN THE PLEADINGS AND EVIDENCE SHOWED MATERIAL ISSUES OF FACT

As soon as the plaintiff purchased his two adjoining farms with a total acreage of 396 acres he called the defendant Kroll to make inquiry about insurance on his farm buildings, farm residence and farm vehicles. The plaintiff, a government worker, had never before owned or operated a farm. He started off in a big way. He was insurance conscious and knew enough to call his trusted insurance agent with whom

he had dealt in good faith for 20 years, relying on Kroll's skill and expert judgment. (J.A. 35, 36, 37, 38, 52, 53) The relevant conversation with Kroll was not made for the purpose of obtaining farm liability insurance but for other insurance; the new farmer did not know or think about such coverage. It was made by Kroll who said he should have liability protection like "the other farmers were carrying." (J.A. 35, 36) The placement and mailing of this policy was only one of many policies sent by the defendants to the plaintiff's farm. The initial total premiums of all the policies was in excess of \$500.00 (J.A. 54); all the dealings were done by telephone between Kroll and Finegan. The farm was a cattle and grain farm (J.A. 36, 37) and the plaintiff lived and operated the farms.

There is no question of Kroll's authority to bind the other defendants; he was the president of the defendant, the Mutual Insurance Agency, Inc., and was a general licensing agent of the defendant, Lumbermens Mutual Casualty Company which company gave him written binding authority of \$300,000.00 for comprehensive policies. Kroll is not a licensed Maryland agent and all the policies herein were countersigned by a Maryland agent of the Insurer's. The policies, being delivered in Maryland and covering a farm operation in that State, Maryland law applies.

The policy delivered to the plaintiff was a Farmer's Comprehensive Personal Liability Policy No. L 349,795 with the limits of liability coverage at \$25,000.00. It is to be noted that the amount of coverage is not the minimum; this amount was also recommended by Kroll. The policy sued upon herein is the second renewal of the original policy with the amount of declared acreage at 35 because the insured had sold the larger farm before the third policy was in effect. To operate the large farm area and raise the cattle, grain, etc., it was absolutely necessary to have farm employees, both full and part time. Mr. Finegan at the time of the original policy had two permanent tenant farmers

on his farms and during the policy periods used upwards of 15 farm workers a year at harvest time, to mend the fences, care for the cattle, etc. (J.A. 36, 37, 55)

A comprehensive personal liability policy is an all risk policy, and not a limited liability policy, which covers many hazards or risks under an individual policy instead of separate policies for each of the many hazards.¹ Comprehensive policies are modern, having only been in use since the early 1930's. The policy was to cover the complete farm operation as far as personal liability to the farmer was concerned. This is what was recommended by the expert Kroll. No application was sent to, or filled out, by the insured, nor was the farm ever inspected by an agent of the Insurer. The authorized agent did everything by telephone. The term "Comprehensive" in a policy would include those damages which an ordinary individual would reasonably and naturally regard as incidental to or flowing from the hazards insured against. Mohawk Valley Fuel Co. v. Home Indemnity Co., 165 N.Y.S.2d 357; Employers' Liability Assoc. Ins. Co. v. Reeds Refrigeration Co., 158 A.2d 616, 220 Md. 49 (Md. 1960). The most apparent hazard of a farmer's personal liability is an injury of a farm worker engaged in the farm operation. The State of Maryland does not require farmers to cover farm workers under workmen's compensation coverage. Such protection under a personal liability policy is necessary in a large farm operation.

The plaintiff did not scrutinize his policy when it was received and there was no duty for him to do so. This will be discussed later. It is a fact that the declaration of the policy (J.A. 16) does not specifically list the farm employees but it was at the time of acquiring the policy impossible to list any employees, or in fact at any time, it was impossible to list employees during a policy period because it was

¹ Insurance Principles and Practices, Frank Joseph Angell, Ronald Press Co., N.Y., 1959, Lib. Cong. No. 59-6625, Pgs. 259-265.

never known before their use whom and how many workers were to be used in the farm operation. It is the custom and usage in the insurance trade to only list and ascertain the number of employees at the end of the policy period. The policy states in the insuring conditions that (Condition 1, J.A. 14):

"1. Premium coverage A and B. The premium for insurance with respect to farm employees is an estimated premium only."

In this respect it is more like the familiar workmen's compensation policy where the identity and number of employees are only known by an inspection and audit of payroll books after the policy period. It is only after the policy period that the insurer knows his total risk and exposure to liability and by inspection and audit, charge the correct premium. This is the custom of the trade and is in fact the only practical way to properly determine the premium because a farmer never knows whether he will use one or fifty farm workers during the year. A part time worker is considered a farm worker. This does not cause confusion since the insurer protects itself by the audit provision as in Condition 2 of the policy (J.A. 14):

"Inspection and Audit. Coverages A and B

"The company shall be permitted to inspect the insured premises and operations and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance."

Never during any of the policy periods did the insurer herein inspect, audit, question or make any inquiry about the plaintiff's farm operation, nor did they do so within three years after the termination of the policies. It is important to note that the defendants, or any of them, did not exclude the coverage specifically by stamping, "NIL,"

"NONE," "EXCLUDED" or "NOT COVERED" in the spaces opposite the declaration marked for farm employees, but it did see fit to specifically exclude on the declaration in Items 5(A) and 5(B) regarding the number of full time resident employees by boldly marking the spaces "NONE." Thus construing the policy as a whole, the policy even as written covers the plaintiff's liability to his farm workers and when consideration is given to custom and usage, this is even more emphatic. The interpretation of the policy as written and in light of all the surrounding circumstances show the coverage to be there even though farm employees are not specifically declared. The interpretation given the policy by the appellees is that farm workers are excluded, thus making the policy the exact same as a home owner's personal liability policy protecting the insured only for liability claims of invitees and guests, but the policy is a Farmer's Comprehensive Personal Liability policy and not a home owner's policy.

In Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 697 (1944), the United States Supreme Court stated:

"... Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law where it is quite clear that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.

A later decision by the same court in interpreting Federal Civil Rule 56(c) is Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) at page 488, states:

"Summary judgment should only be entered when the pleadings, depositions, affidavits and admissions filed in the case 'show that (except as to the amount of damages) there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'."

Summary judgments are not appropriate in actions "where motive and intent play leading roles." White Motor Co. v. United States, ___ U.S.

_____, Supreme Court of the United States, October term, 1962, Case No. 54, March 4, 1963. Summary judgment is a most drastic remedy and should be applied with caution and it cannot serve as a substitute for the trial of a case without a jury. Bushman Construction Co. v. Conner, 307 F.2d 888 (1962, 10th Cir.), Love v. American Casualty Co. of Reading, Pa., 306 F.2d 802 (U.S. App. D.C. 1962). An action such as the one herein involves many factual issues and is most complicated. This Honorable Court stated in Indian Lake Estates, Inc. v. Lichtman, 311 F.2d 777 (1962), denying summary judgment, that:

"The claims of the complaint present complex issues of fact and law as well as some which are mixed questions of law and fact, which were not susceptible of disposition by summary judgment."

The same is true of this action; here we have questions of intent, motive, waiver, estoppel, custom and usage of insurance, negligence, contributory negligence, reformation, ambiguity, agency, warranty, good faith and many others, all to be determined by a trial. In granting the summary judgment, the trial court merely stated as to Count I (breach of contract) that said remedy did not apply because the farm employee was not specifically declared in the policy. No evidence was presented on these issues to show the many issues listed above and prove that as alleged in the pleadings, etc. such coverage was in fact in force during the policy period. (J.A. 71, 73) As to the counts of reformation and negligence, the trial court applied the doctrine of laches and statute of limitations. (J.A. 71, 72, 73) These will be discussed later.

Reformation Is a Proper Remedy for the Appellant

Even if as a matter of law the appellant is not entitled to relief on his claim for breach of contract, he may obtain similar relief for breach of contract as reformed. It was the purpose and intent of the appellant and the defendant Kroll to effect the placement of a liability policy to protect the farmer in his farm operation. The comprehensive farm

policy placed is the very type which gives such protection; the policy by its very title and appearance makes such broad coverage apparent. The long term, good faith dealing of the appellant with Kroll, the authorized agent of the other defendants, shows the full reliance of the appellant with his expert insurance adviser. The fact that employee coverage was not specifically excluded gives added evidence that there was no unequivocal limitation of the comprehensive coverage. Concerning such exclusions it was stated in Bauman v. Royal Indemnity Co., 174 A.2d 585 (N.J. 1961) at page 589:

"In Gunther, as here, the insurance company designated its insurance policy as a comprehensive personal liability policy and sold it to the policy holder as such. The designation was a very broad one and while the company had the undoubted right to exclude particular types of personal liability from the so-called comprehensive coverage, its responsibility was to do so unequivocally. . . . In all fairness to the ordinary layman who is the average insured, an exclusion clause should be so prominently placed and so clearly phrased that 'he who runs can read'. See Lord St. Leonard in Anderson v. Fitzgerald, 4 H.L.C. 484, 510, 10 Eng. Rep. 551, 561 (1853). In recent years our courts stressing the need for clarity and forthrightness in insurance policies have repeatedly adopted liberal constructions of policy provisions which were obscure, ambiguous or uncertain."

The appellant, knowing that he received a comprehensive liability policy and knowing that he would use many farm employees in his operation, felt secure, and knew further that he would not have to take out a voluntary farmer's compensation policy. He was satisfied that he was fully covered "like the other farmers" as told by Kroll. When an insurance company attempts to limit coverage and employs ambiguous language, the ambiguity will be resolved against it. Haynes v. American Casualty Company, 179 A.2d 900 (Md. 1962). In Eagle Star and British Dominions Ins. Co. of London v. Fleischman, 2 A.2d 424 (Md. 1938), where in a fire insurance policy, there was conflict as to what exact properties were covered, the court stated:

"Having used language in the insurance contracts which produced this result (the conflict), they can not now escape the consequences which may logically follow by asserting it was never their intention to insure the properties on the Annex. If this contention were accepted, the rights of an insured, after sustaining loss, could under policies of this character always be defeated by an insurer, simply by testifying without contradiction that he had no intention of covering the properties destroyed. . . . In Washington Fire Insurance Co. v. Davison and Symington, 30 Md. 91, our predecessors held that ambiguous language could not be controlled by the insurer's understanding without proof that such understanding was known to the insured."

Another Maryland decision in First National Bank of St. Marys v. Maryland Casualty Co., 121 A. 379, 142 Md. 454 (1923), stated:

"In ascertaining the intention of the parties to an insurance contract, as gathered from the language by them, the character, object and purpose of the contract and attending circumstances must be considered."

Where the construction of an insurance contract is quite clear and unequivocal as to the subject matter and purpose, it is for the court to construe, but where the surrounding circumstances create a doubt as to the meaning and purpose of the contract, the construction, to determine the proper meaning, is for the jury. The construction is to be determined if reasonably possible from the policy as a whole. Where the instrument is drawn by one party, the insurance company here, an ambiguity will be resolved against the party who drafted the instrument. Ebert v. Millers Mutual Fire Insurance Co., 155 A.2d 484, 220 Md. 602 (Md. 1959). In Pennsylvania Threshermen and Farmers Mutual Ins. Co. v. Shirer, 168 A.2d 525, 224 Md. 530 (Md. 1961), the court stated:

"Maryland follows the rule that the intention of the parties to a policy of insurance is to be ascertained, if reasonably possible, from the policy as a whole . . .

"If an insurer in attempting to limit coverage in a liability policy failed to make its intended meaning clear and drew an ambiguous clause, that ambiguity would be resolved against the insurer."

As a general rule, grounds for forfeiture or avoidance of an insurance policy can not be availed of by the insurer if they are due to the mistake or fault of an agent of the company without the knowledge or collusion of the insured. West Maryland Law Encyclopedia, Sec. 178, pg. 480, Vol. 12. Here there is no evidence of bad faith or misrepresentation on part of the appellant. Where doubt or ambiguity exist in a contract of insurance, the policy may be construed with reference to the general and well established usages and customs of the mercantile world or of the trade or business which is insured. Planters Mutual Ins. Co. v. Rowland, 7 A. 257, 66 Md. 236 (Md. 1886).

In Portella v. Sonneberg, 181 A.2d 385, 74 N.J. Super. 354, (N.J. 1962), a furniture merchant on advise of an insurance agent, was sold several policies of insurance including a comprehensive personal liability policy for protection in the operation of his store. He had been told by the agent that he was "completely covered" but there was no specific discussion to the exact limitations of coverage. A business invitee was injured in the store elevator and brought suit against the merchant. The carrier of insurance disclaimed coverage, stating that the elevator coverage was excluded in the comprehensive policy as it was not set out in the policy declarations. The carrier was joined, under New Jersey law, as a third party defendant. The carrier then appealed, after judgment against it. The court, in allowing the merchant to reform the policy, stated (pg. 388):

"But even if we were to conclude that Maginnis (the insurance agent) had in mind from the start that he would not give Sonneberg elevator coverage, his conduct in remaining silent about the elevator exclusion after inspecting the store with full knowledge of the insured's request for and expectation of total coverage would constitute such conduct in

inducing the mistake as would justify granting reformation even if the mistake were unilateral."

pg. 389 "It would be unjust to visit the loss upon an insured whose good faith is unassailable and to absolve a carrier which could have asked, but did not, for the facts it regards as material."

"There is no doubt that Sonneberg was chargeable with knowledge of the contents of his policy. . . . But the general rule, based as it is on business utility, will not arrest the duty of good faith and fair dealing residing with the insurer. . . . And the policy in question was no fair warning to a person of reasonable prudence that elevator coverage was excluded, especially to a person in no way alerted to the possibility of any doubts about such coverage."

pg. 390 "Good faith demands that the insurer deal with layman as layman and not as experts in the subtleties of law and underwriting."

". . . the insured had every reason to think that the policy would contain elevator coverage, and where inspection of the policy would confirm such belief, we will not impose a duty of inspection greater than what is reasonable under the circumstances.

"Consequently, we hold that Sonnenberg's failure to note the exclusion of elevator coverage does not bar recovery here."

pg. 388 "Even if Maginnis (insurance agent) did not know of the existence of an elevator upon the premises, since he knew Sonnenberg asked for and expected to receive complete coverage, it was Maginnis' duty, before issuing a policy excluding elevators, to (1) inquire whether there were elevators on the premises, or (2) tell Sonnenberg that elevators were not covered, or (3) write the policy so plainly that an examination thereof would bring home the exclusion to Sonnenberg."

Schaefer v. Md. Casualty Co., 123 F. Supp. 873 (D.C.S.C. 1954)

The term Comprehensive in a liability policy conveys the reasonable and natural meaning that it would cover all risk and hazards that would flow from the operation insured; to convey another meaning would indeed be ambiguous and confusing to the insured. Mohawk Valley Fuel

Co. v. Home Indemnity Co., 165 N.Y.S. 2d 357; Employers' Liability Assurance Corp. v. Reeds Refrigeration Service, 158 A.2d 616, 222 Md. 49 (Md. 1960).

If an exception to the general meaning of the policy is to be made, the insurer should do so clearly.* The Employers' case above, involving the interpretation of a comprehensive dishonesty policy, ruled for the insured in stating:

pg. 618 "There is not even a schedule of amounts of coverage on different employees — the insurer wrote a comprehensive policy, so designated — and used the terms of ordinary meaning to define the risk it assured."

Here we have the farmer relying on his expert insurance adviser, Kroll, an authorized agent of the other defendant, who knew or should have known that the operation of a 396 acre farm would require many workers, particularly during the harvest season. None of the defendants made any inquiry, inspection, not even an application or questionnaire, during the policy periods, although they had that right to do so by the inspection and audit clause. The appellees state that the coverage was not there because opposite the farm employee declaration, there was a blank space. In this comprehensive policy they did not clearly, specifically and unequivocally exclude this coverage. Why did they write "NONE" opposite item 5(a) and 5(b) on the face of the policy (J.A. 16) but fail to do the same opposite the farm employee coverage? Why is the farm employee coverage base premium an estimated premium which has to be determined by audit and inspection after the end of the policy period or three years thereafter? Why is such a premium not final? The answer is that it is the custom and usage based upon necessity, a farmer can never tell beforehand the number or name of his employees, much the same that a factory or large store never knows before the end of the year how many employees they have used.

*Section 75 of West Md. Law Encyclopedia affirms the general rule that contracts must be construed most strongly against those who make them; that insurance policies should be construed liberally in favor of the insured and strictly against the insurer. (Vol. 12, Insurance, sec. 75)

The appellees allege in defense that although the title of the policy is a farm comprehensive policy, it is not: they state that it is in effect a home owner's personal liability policy for the limited purpose of protecting the insured against claims of guest or business invitees. Why was not a home owner's liability sold instead of the farm policy? Why does the insurer here require three years after the end of the policy to adjust the employee coverage premium? Is this good faith on the part of the appellees? Where is the bad faith, fraud or misrepresentation on part of the appellant? The appellant did not draw the policy, Kroll did. Kroll was the agent of both parties and his mistake, inequitable conduct or negligence was imputable to the other defendants.¹

Negligence Is Also a Proper Remedy for Appellant

The 20 years of prior dealing in good faith with the appellee Kroll shows complete reliance by the appellant on his skill and judgment as an insurance expert and adviser. It must be kept in mind that the purchase of the policy herein was only one of many policies obtained from the defendants in the preparation of the appellant's first farm operation. The appellant, being insurance conscious, even called Kroll from the settlement office at the time he obtained the farms. (J.A. 62) Kroll was not a licensed Maryland agent and had written few, if any, farm policies; the policy had to be countersigned by the Insurer's Maryland agent. Kroll handled all the insurance placement on the farm by telephone, never inspecting it or even sending an application. This was a violation of the custom and usage of the trade. There is little risk in writing an automobile or fire policy over the phone because the subject

¹ This Honorable Court recently, in Aetna Casualty and Surety Co. v. Casolaro, ___ U.S. App. D.C. ___, ___ F.2d ___, stated that:

"Having written the original policy and the several renewals and having accepted the premiums thereon, Aetna Casualty Co. cannot be heard to say the policy involved does not express an agreement reached by the parties or that it is not sufficiently specific to be a valid contract. We think it covered any 400 case histories which might be lost."

Lazarus v. Manufacturers Cas. Ins. Co., 105 U.S. App. D.C. 357 (1959).

matter of such policies is simple and limited, but to write an all risk, comprehensive policy on a large farm operation for the first time is negligence. Even to so write a renewal of such a policy is risky and negligent. There is no doubt of the good faith of the appellant in the appellees at the time of acquiring the farms. The appellees have argued much to the effect that the appellant did not strictly read and scrutinize the policy, the same which was represented to him by Kroll as giving him full coverage "like the other farmers." What duty was upon the appellant to read the policy after such reliance and in light of all the other circumstances? Maryland courts hold that there is no such duty.

Hoffman v. Chapman, 34 A.2d 438 (Md. 1943):

pg. 411 "But mere inadvertence or negligence not amounting to a legal duty, does not bar a complainant from relief . . .

"Hence, it is not necessary for the complainant in a suit for reformation to prove that he exercised diligence to ascertain what the instrument contained at the time he signed it. The term 'mistake' conveys the idea of fault, and the mere fact that a mistake was made in the phraseology of the instrument does not establish such negligence as to preclude the right of reformation; for if it did, a court of equity could never grant relief in such a case. . . . 'The mistake in this case was not unilateral. The draftsman of the deed was acting as agent of the parties. His mistake in the description of the real estate became the mistake of all the parties. . . .' Boulden v. Wood, 96 Md. 332, 337, 53 A.911."

In Maryland, if an agent with real or apparent authority and without knowledge or collusion of the insured, makes false or incomplete statements in a policy application, the insurer is bound. The insurer is estopped by the agent's negligence to include full coverage as here. Great Eastern Casualty Co. v. Schwartz, 122 A. 647, 143 Md. 452 (Md. 1923); 45 C.J. Sec. Insurance, sec. 725; Hould v. Maryland Casualty Co., 144 A. 261, 83 N.H. 874 (1929). The appellant signed nothing in regards to the placement of the insurance and he did not draw the insurance

contracts, he knew that it was a comprehensive liability on his farm and relied on it as such to give him full protection, notwithstanding the fact that the base premium rate was not specifically set out in the space next to the employee declaration. Does his failure to read and understand this comprehensive all risk coverage with multiple hazard protection negate the duty of good faith on part of the appellees? No. Even if deemed negligent, the acts of appellees will not arrest the duty of good faith and fair dealing residing with the insurer. Portella v. Sonnenberg, supra. The policy here gave no fair warning of any employee exclusion and appellant was in no way alerted to any such limitation of coverage. The very purpose of such a policy is to give the farmer all risk protection. Why was not the employee declaration marked "NONE" as was other coverage? This was negligence. Hampton Roads Carriers, Inc. v. Boston Insurance Co., et al., 150 F. Supp. 338 (D.C. Md. 1957), stated the following regarding an agent's negligence:

"An insurance agent who undertakes to secure a specified coverage is liable in damages to the applicant for failure to procure such insurance, and this liability extends to negligence as a result of which the specified risk is not included in the policy. 16 Appleman Ins. Law and Practice, 1944 Ed. Sec. 8831, p. 272. 2 Couch Ins. Sec. 463, 1320, 1321."

"The general rule is that the insured is entitled to rely upon the agent having performed his duty, and is not denied recovery because he (the insured) failed to read the policy and discover the error or omission. Such a failure by the insured is ineffective as a bar, either upon a theory of estoppel or 'contributory negligence.' Cooley's Briefs on Insurance (2 Ed.) 940 et seq."

Why did not the insurer use the right to inspect and audit the farm operation? Such a right was in the policy. It was in the policy for the sole protection of the insurer. They waived such right and are estopped from asserting ignorance of the use and number of employees used by the appellant. (West Md. Encl. Insurance, Vol. 12, Secs. 171, 172, 173)

The term "Waiver" has a special meaning in application to the law of insurance. It is a voluntary relinquishment of a known right by the insurer. It involves only one of the parties, the insurer; whereas estoppel involves two. When they accepted such a policy as here without clearly and specifically excluding employee coverage, it was a waiver to claim such a limitation and they are estopped from doing so. It was also a waiver not to make use of the inspection clause.

The appellees have heretofore strongly argued the principle put forth in John Hancock Mutual Life Ins. Co. v. Plummer, 28 A.2d 856, 181 Md. 140. (Md. 1942), where the court was called upon to interpret the double indemnity clause of a life policy. The policy required evidence of death by sudden violent and external means as evidenced by trauma. The plaintiff there died of natural causes and there was never any question of extending the double indemnity clause to cover such a loss. See Haynes v. American Casualty Co., 179 A.2d 900 (Md. 1962), pg. 904. The appellees have violated their duty of good faith to appellant.

The appellant has a law degree and passed the local bar in 1935 but never practiced law or was ever employed in a legal job. (J.A. 27, 28) As such does he have a special duty beyond that of an ordinary insured? No. To hold otherwise would require those dealing with such a person to no duty of good faith.

The rule of "caveat emptor" does not apply in insurance contracts because the buyer is not in good position to inspect the product purchased even if a specimen policy is furnished, it may be beyond his ability. Angell, Ins. Prin. and Pract., 1959, Ronald Press Co., N.Y., Lib. Cong. No. 59-6625, Sect. 44. Insurance companies have a duty of good faith to the public. An insurance agent is held to have all the authority which was apparent to the insured that he possessed and the insurance company is bound by the acts of subordinate agents, not only in the scope of their actual authority but within the scope of their

apparent authority. Eureka Md. Assurance Corp. v. Samuel, 62 A.2d 622, 191 Md. 603 (Md. 1948), Dunn v. Victor Othello and Sons, 149 N.Y.S. 2d 630.¹

II.

THE APPELLANT'S REMEDIES OF REFORMATION AND NEGLIGENCE ARE NOT BARRED BY DOCTRINE OF LACHES OR THE STATUTE OF LIMITATIONS AND WERE TIMELY FILED.

The trial court in granting the summary judgments did not seem to think that appellant's Count I (breach of contract) was barred by the statute of limitations but applied that bar to Count III (negligence) and the bar of laches to Count II (reformation). (J.A. 71, 72, 73) To properly apply such defenses we must bear in mind the subject matter and dates.

The following is a schedule of dates of all relevant facts in this action, and they are not in dispute:

1. The three farm liability policies were in full force and effect for the successive yearly periods, April 3, 1953 to April 3, 1956.

2. The negligent injury to the farm employee by the appellant, January 2, 1956.

3. The appellant receives letter of disclaimer from the Insurer, denying employee coverage, January 18, 1956.

4. The appellant sues the Insurer in Montgomery County, Md. Circuit Court for breach of contract (No. Law 5992), November 12, 1956.

5. The injured farm worker through his father and next friend sues the appellant farmer in the Montgomery County, Md. Circuit Court in Law No. 7546, for \$90,000.00, on March 17, 1958.

¹ As to the question of whether the failure to read a policy constitutes negligence precluding relief for the insured, see 81 A.L.R. 2d, pgs. 1-128, reviewing the case of Maland v. Houston Fire Insurance Company, 274 F.2d 299, where the insured was not deemed so negligent and agent bound company by his mistake.

6. A consent judgment in the amount of \$10,000.00 was entered in favor of the farm worker against the appellant on May 5, 1959.

7. The judgment against the appellant (Law 7546) was finally paid by him on December 22, 1959.

8. Action in the U. S. District Court for District of Col. filed by appellant against all appellees, January 12, 1960.

9. Law action No. 5992, dismissed without prejudice in the Montgomery County Court, January 13, 1960. A demurrer was granted in favor of the Insurer but without prejudice to the Appellant by the Maryland court shortly after this action was filed because it was premature, the plaintiff therein having not then suffered any proveable damages; the action was not finally dismissed on record until January 13, 1960.

**The Liability Policy Sued Upon Herein is a Contract
for Indemnity to Protect the Insured Against Loss by
Liability**

The insurance contract sued upon herein contains the following provisions:

"Insuring Agreement 1. Coverage A-Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, etc." (J.A. 13)

"Condition 9. Action Against Company. Coverage A. No action shall lie against the company, unless as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligations to pay shall have been fully determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." (J.A. 14)

Appleman on Insurance, Vol. 20, sec. 11864.

Thus, it is clear that the contract here promises to indemnify the insured for sums that he is legally obligated to pay after judicial determination. It does not agree to assume his liability but merely to protect

him against loss as a result therefrom. Thus the loss cannot be determined until judgment against him. This loss is one resulting from personal legal liability for bodily injury to another as determined further by legal damages to the third party or claimant. The "No Action" clause in the policy and the liability in insuring agreements clarify beyond a doubt that this is an indemnity contract against loss by liability.

The State of Maryland has no statute to permit an action against an insurer in such a contract before the liability is discharged. In Poe v. Philadelphia Casualty Co., 84 A. 476, 118 Md. 347 (Md. 1912), at page 476, it is stated:

"The difference between a contract of indemnity and a contract to pay a legal liability of another is that on the contract of indemnity an action cannot be bought and a recovery had until the liability is discharged; while upon the other, the cause of action is complete when the liability attaches."

Again Maryland law is stated in Gorman v. St. Paul Fire and Marine Ins. Co., 121 A.2d 812, 210 Md. 1 (Md. 1956), that liability policies are only required to afford a direct action by an injured party against an insurer after a judgment has been obtained against the assured, which is unsatisfied after execution. At pg. 815 such decision states:

"The chief difference between a liability and an indemnity policy is that under the former a cause of action accrues in advance of a discharge of liability by payment of a judgment by the assured. Appleman Ins. Law, #4261, 4862."

Liability of an insurer under a liability policy does not accrue until actual loss or damage against the insured as shown by payment or discharge of his liability. West Md. Law Encyl. V. 12, sec. 218, Insurance; Tubize Chatillon Corp. v. White Trans. Co., 11 F. Supp. 91 (D.C. Md. 1935).¹

¹ The Tubize case has a lengthy opinion by J. Chesnut concerning the types of indemnity contracts and when cause of actions accrue on behalf of the assureds therein.

In Northwest Airlines v. Glenn Martin Co., 161 F. Supp. 452 (D.C. Md. 1958) where an airline sued the maker of one of its planes which crashed and killed all passengers for indemnity for loss due to the passenger claims and for contribution, the court stated:

"That the right of action for indemnity arises and limitations begin to run from the time of payment or settlement by the one secondarily liable and the right of contribution arises at and the limitations begin to run from the time of payment in excess of plaintiff's proportionate share, is consonant with general recognized authority."

The action there was 8-1/2 years after delivery of the plane to the airline but within 3 years of the earliest of the many settlements by the plaintiff. In Southern Maryland Oil Co. v. Texas Co., 203 F. Supp. 449 (D.C. Md. 1962), Judge Northrop stated in a similar case:

"Under Maryland Law, the right to both indemnification and contribution, whether based on contract or tort, accrues at time of payment, not before."

Maryland and D. C. law do not vary in this issue. This Honorable Court in Hanna v. Fletcher, 97 U.S. App. D.C. 310, 231 F.2d 469 (1956), concerning negligence and warranty, stated:

"The code is controlling—the action against Ginchner is based on negligence and sounds in tort, and did not accrue until injury resulted from the alleged negligence. Poole v. Terminex, 91 U.S. App. D.C. 287, is not apposite, it was an action for property damages due to breach of warranty to do a workmanlike job. There the suit would have been timely if the limitation period was measured from time of discovery etc. We cannot shorten the time the Code allows by adding a provision that the personal injury must occur within 3 years of the negligence."

This Court went on to state that even if Mrs. Hanna's action was deemed to be for breach of contract, such action would accrue at the time of injury and not at the time of the defective repairs.

All Actions Herein Were Timely Filed

If the "No Action" clause is to be interpreted most favorably for the insured appellant, it means that no action, legal, equitable or otherwise, may be instituted before final determination of judgment against him. Almost all actions by the insured against an insurer are for reformation. The court below stated that the appellant was not diligent in bringing his action (J.A. 71, 72, 73), but it failed to consider the fact that appellant's action No. Law 5992 in the Circuit Court filed November 12, 1956 was dismissed as being premature. The appellant was then too diligent. The trial court failed to consider when argued that the limitation of action would only start from the date of the satisfaction of the judgment against the insured by the farm worker, which was finally paid on December 22, 1959, just 20 days before this action was filed in the trial court. The appellant did not suffer legal damage until he paid and satisfied the judgment against him. This would be true regarding any legal or equitable remedy against the Insurer or its authorized agents regarding the placement, sale and other facts under the policy sued upon. Although agency is not here an issue, there is adequate proof of the agency-principal relationship among all the appellees. The trial court was in error in computing the time for the accrual of appellant's action as from the time of the denial or disclaimer by the Insurer, January 18, 1956, instead of December 22, 1959, the date that the final payment was made by Finegan on the judgment against him.

In all action with concurrent legal and equitable remedies, equity follows the law as far as the determination of timeliness of action. Cassel v. Taylor, 243 F.2d 259, 100 U.S. App. D.C. 153; Cope v. Anderson, 1947, 331 U.S. 461, 67 S. Ct. 1340, 91 L.Ed. 1602; Holmberg v. Ambrecht, 1946, 327 U.S. 392, 395, 66 S. Ct. 582, 584, 90 L.Ed. 743. In the Cassel case, this Honorable Court stated:

pg. 155 "In those instances where the court has concurrent jurisdiction to grant equitable or legal relief in the enforcement of the asserted obligation, equity follows the law and the equitable remedy will be withheld if the local Statute of Limitations would bar the concurrent legal remedy."

The converse is true. In Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 at pg. 951, the Supreme Court states:

"Where there has been no excusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief."

Here, there is no dispute about the local 3 year limitation for bringing a legal action in tort or contract, nor about the fact that reformation is an equitable remedy. The facts revealed that the appellant's actions were all brought within 20 days after he was first permitted to do so under the "No Action" provision of the policy and under the Maryland law of indemnity. Since the damage was not final until he paid the judgment, and because of the agency relationship of the Agency and Kroll to the Insurer, appellant's action against Kroll and the defendant Agency were timely. The trial court was in error in applying the bar of laches and the statute of limitations to Counts II and III of the complaint. If they did apply, why did they not also apply to Count I (breach of contract)?

CONCLUSION

This appellant respectfully submits that there are many important genuine issues as to material facts raised by the pleadings, depositions, exhibits and opening statement in this cause of action, and that the appellees are not entitled to a judgment as a matter of law. The issues herein are important to all who seek protection in their businesses through insurance and who repose good faith in the skill and judgment of insurance brokers and agencies. The opportunity should be given for

all the evidence and facts to be fully developed in trial before a jury. The court below should be reversed and the Motions for Summary Judgment granted by it should be set aside and a trial ordered on the merits of all the causes of action.

Respectfully submitted,

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Attorney for Appellant

(1)

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JOINT APPENDIXUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

PAUL V. FINEGAN)

5024 Bradley Boulevard)

Bethesda 14, Maryland)

Plaintiff)

vs.)

LUMBERMENS MUTUAL CASUALTY COMPANY,)

a body corporate)

Chicago, Illinois (or in care of Commissioner)
of Insurance for the District of Columbia))

and)

MUTUAL INSURANCE AGENCY, INC.,)

a body corporate)

1301 H Street, N.W.)

Washington, D.C.)

and)

JOHN H. KROLL)

1301 H Street, N.W.)

Washington, D.C.)

Defendants)

Civil Action

No. 103-60

DOCKET ENTRIES

ProceedingsDate1960

Jan. 12	Complaint, appearance Exhibit	filed
Jan. 12	Summons, copies (3) and copies (3) of Complaint issued all ser 1-13-60.	
Feb. 11	Appearance of Brault & Graham for defts; c/m 2-3-60	filed.
Mar. 4	Answer of defts #2 and #3 to complaint; c/m 3-4-60; Appearance of Pledger, Edgerton, and Richardson for defts #2 and #3	filed.
Mar. 7	Answer of debt #1 to complaint; c/m 3-6-60	filed.
Mar. 7	Calendared. (N)	

<u>Date</u>	<u>Proceedings</u>
Apr. 4	Request of defts #2 and #3 for admissions; c/m 3-29-60; exhibits A and B. filed.
Apr. 8	Answer of pltf to defts' "Request for admissions of facts"; c/m 4-8-60. filed.
May 13	Called. Pretrial Examiner.
Oct. 13	First notice under Rule 13
Oct. 25	Motion of deft. #1 for summary judgment c/m 10-24-60; P & A; statement of material facts; M.C. filed.
Oct. 25	Motion of defts 2 & 3 for summary judgment; notice; c/m 10-25-60; P & A; statement of material facts: M.C. filed.
Oct. 26	Motion of pltf. to extend for 6 months dismissal under Rule 13; no objections; c/m 10-26-60; P & A. filed.
Oct. 26	Order extending period for dismissal under Local Rule 13(a) for 60 days. (N) McLaughlin, J.
Nov. 17	Opposition of pltf to motions for summary judgment; c/m 11-16-60. filed.
Dec. 28	Motion of pltf for production of documents; c/m 12-28-60; exhibit "A"; M.C. 12-28-60. filed.
<u>1961</u>	
Jan. 6	Opposition of defts to motion for production; c/m 1-5-61. filed.
Jan. 11	Reply memorandum of defts #2 & 3 in support of their motions for summary judgment; c/m 1-10-61. filed.
Jan. 18	Motion of deft #1 for summary judgment and motion of defts #2 & #3 for summary judgment argued and submitted. (reported by D.F. Sweet) Walsh, J.
Jan. 23	Order denying each of the Motions for Summary Judgment filed by defts. (N) Walsh, J.
Jan. 26	Consent order extending period for dismissal under Rule 13 for sixty days. (N) Matthews, J.
Jan. 26	Order denying pltf's request for production of documents as set forth in para 1(A) of motion and directing defts to produce as per pltf's request in para. 1(b), 1(c) and 1(d) of motion within 30 days. (N) Matthews, J.
Jan. 27	Motion of defts 2 & 3 to re-hear motion for summary judgment; c/m 1-25-61; P & A; M.C. filed.
Feb. 1	Motion of deft #1 for rehearing on motion for summary judgment; c/m 1-31; P & A; M.C. filed.

<u>Date</u>	<u>Proceedings</u>	
<u>1961</u>		
Feb. 6	Notice by deft #1 to take deposition of pltf; c/m	2-2-61. filed.
Mar. 7	Opposition of pltf to motions of defts to grant rehearing of motion for summary judgment; c/m	3-6-61. filed.
Mar. 7	Motion of deft #1 to amend answer; P & A; c/m	3-6-61. filed.
Mar. 21	Order granting motion of Lumbermens Mutual Casualty Co. to amend answer. (N)	Walsh, J.
Mar. 21	Order denying motions of Lumbermens Mutual Casualty Co. and Mutual Insurance Agency, Inc. and John H. Kroll for rehearing of motions for summary judgment; and modifying order of January 23, 1961, that denial of motions for summary judgment is without prejudice to said defendants refiling additional motions for summary judgment. (N)	Walsh, J.
Mar. 29	Deposition of pltf 2-23-61; (\$95.40)	filed.
Mar. 29	Amended answer of deft; c/m	3-28-61. filed.
May 29	Certificate of Readiness. N/AC	filed.
July 3	Pretrial proceedings	Pretrial examiner
<u>1962</u>		
Nov. 26	List of witnesses of pltf.; c/m	11-26-62. . filed.
Dec. 1	Trial brief of pltf.	filed.
Dec. 10	List of witnesses of deft #1; c/m	12-3-62. filed.
<u>1963</u>		
Jan. 21	Additional authorities to be relied on by deft. #1; c/s	1-21-63. filed.
Jan. 23	Jury sworn; trial respited until 1-24-63. (Rep. B. Williamson)	Curran, J.
Jan 24	Trial resumed; same jury; respited until 1-28-63. (reported by Barbara Williamson.)	Curran, J.
Jan 28	Trial resumed; same jury; respited until 1-29-63. (Rep. H. Kaitz)	Curran, J.
Jan. 29	Trial resumed; same jury; mistrial ordered; jury discharged. Motion of defts. for summary judgment granted. (Order to be presented). (Rep. B. Williamson)	Curran, J.

<u>Date</u>	<u>Proceedings</u>
<u>1963</u>	
Jan. 29	Memorandum of Law by defts. #2 & #3 on the application of the statute of limitations in re: reformation. filed.
Jan. 29	Memorandum of pltf. in opposition to defts third motion for summary judgment; c/s 1-28-63. filed.
Jan. 30	Order granting the motions of each deft. for summary judgment on all three counts of the complaint. (N) Curran, J.
Feb. 6	Notice of appeal of pltf.; deposit by Laughlin \$5.00; (copies mailed to John F. Mohoney and Albert E. Brault). filed.
Feb. 7	Order transmitting entire record (original) to USCA, forthwith. (N) Curran, J.
Feb. 11	Transcripts of Proceedings 1-23-63 Vol. I, pp. 1 thru 20; 1-29-63 Vol. I, pp. 1 thru 7. (Reported by Barbara A. Williamson Atty's Copy) filed.
Feb. 11	Transcript of proceeding 1-23-62, Vol. I, pp. 1 thru 20; 1-29-63 Vol. I, pp. 1 thru 7. (Reported by Barbara A. Williamson Clerk's Copy).

[Filed January 12, 1960]

**COMPLAINT FOR REFORMATION OF INSURANCE POLICY,
DAMAGES FOR BREACH OF CONTRACT AND NEGLIGENCE**

**COUNT I
(Breach of Contract)**

1. The amount in controversy exceeds \$3,000.00 and is within jurisdiction of this Court.
2. The plaintiff is an adult United States citizen, a resident of the State of Maryland who was engaged at all times mentioned in this complaint in the business of farming.
3. The defendant, Lumbermens Mutual Casualty Company (hereinafter referred to as the defendant Insurance Company), is a foreign body corporate, without a home office in the District of Columbia, engaged in the casualty and liability insurance business in the District of Columbia,

and throughout the United States.

4. The defendant, Mutual Insurance Agency, Inc., (hereinafter referred to as the defendant Agency), is a foreign body corporate licensed to do business in the District of Columbia and does operate a general insurance agency at 1301 H Street, N.W., Washington, D.C.

5. The defendant, John H. Kroll, (hereinafter referred to as the defendant Broker), is an adult citizen of the United States and a resident of the District of Columbia who is engaged in business as a general insurance broker at 1301 H Street, N.W., Washington, D.C.

6. On January 2, 1956, there was in full force and effect a Farmer's Comprehensive Personal Liability Policy No. 5L 349-795, a copy of which is attached hereto and prayed to be read as a part hereof, which policy was issued by the defendant Insurance Company in consideration of a premium paid thereon, through its agent, the defendant, Mutual Insurance Agency, Inc., to the plaintiff, Paul V. Finegan, as the insured, by the terms whereof, during the period from April 3, 1955, to April 3, 1956, the defendant Insurance Company agreed to extend liability insurance coverage to the insured in the operation and maintenance of his farm located at Route #3, 2/10 mile southeast of Gaithersburg, Maryland, and more specifically to:

(A) To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury and sickness, sustained by any person (as a result of the operation and maintenance of the farm), and

(B) To pay all reasonable medical expenses incurred within one year of date of accident for each person who sustains bodily injury or sickness caused by accident which is caused by activities of an insured, and

(C) To defend and/or settle any claim or suit against the insured alleging injury and seeking damages on account thereof;

the liability of said Insurance Company being limited to the sum of

\$25,000.00 and the medical payment coverage being limited to \$250.00 for each person covered.

7. On January 2, 1956, the plaintiff, Paul V. Finegan, while engaged in the operation and maintenance of his farm did negligently injure one John Nicholson, a casual farm employee of the insured not residing on the farm and did cause serious and permanent bodily injuries to said employee; that said insured did promptly submit to the defendants notice of a claim against him by the aforesaid John Nicholson for bodily injuries and proofs of loss and otherwise performed all the conditions of said policy; that notwithstanding these facts the defendant Insurance Company disclaimed coverage and refused to defend, investigate and/or settle or otherwise protect the plaintiff from said liability claim and otherwise refused to perform the policy insuring agreements; that the insured was forced to adjust, settle and defend the liability claim asserted against him by John Nicholson and in doing so was forced to hire attorneys. That the plaintiff in an effort to mitigate his liability and damage did on advice of experienced legal counsel pay the sum of \$1226.51 on behalf of the said injured, John Nicholson, which figure represents the medical expense incurred by the said Nicholson; that said Nicholson did file through his father as next friend a liability suit against the plaintiff in the Circuit Court for Montgomery County, Maryland, on or about March 17, 1958, in Law Case No. 7546, which case the defendant Insurance Company wrongfully refused to defend after receiving prompt notice. That said liability suit resulted in a judgment against the plaintiff in the sum of \$10,000.00, said judgment being entered by order of the Circuit Court for Montgomery County, Maryland, on May 5, 1959; that the plaintiff was forced and obligated to expend the sum of \$775.00 in attorney's fees in the defense of said suit, and that the total damage suffered by the insured as a result of the defendant Insurance Company's breach of the insurance policy is \$12,001.51, plus costs and interest.

WHEREFORE, the premises considered, plaintiff Paul V. Finegan prays:

1. For a judgment against the defendants and each of them for breach of contract in the amount of \$12,001.51, plus interest and costs.

2. For such other further and general relief as the nature of the case may require.

COUNT II

(Reformation of Contract)

1. The plaintiff incorporates by reference all the facts and allegations contained in paragraphs 1 through 7 of COUNT I of this complaint.

2. That on or about April 3, 1953, the plaintiff, while engaged in conversation with defendant Broker, regarding fire insurance coverage on his farm properties was told by said defendant Broker that he should have "A Farmer's Liability Policy" and that as a result of the defendant Broker's suggestion, the plaintiff purchased a "Farmer's Comprehensive Personal Liability Policy", the renewal of said policy is in issue here. The plaintiff purchased said insurance policy from the defendant, John H. Kroll, a licensed insurance broker and agent and officer of the defendant Mutual Insurance Agency, Inc., a general insurance agency for the defendant, Lumbermens Mutual Casualty Company and had done business with all three defendants for a period of time exceeding 20 years prior to January 2, 1956, and relied on the experience, skill and specialized knowledge of the defendant, John H. Kroll, individually and as agent for defendant Insurance Company and defendant Agency, in purchasing his insurance policy and that the policy heretofore mentioned, Policy No. 5L 349-795, is a second renewal of the plaintiff's "Farmer's Comprehensive Personal Liability Policy", a similar policy was written by the defendant Insurance Company, through the defendant Agency and purchased through the defendant, Kroll, for the two prior years to the effective date of the policy heretofore mentioned, that the plaintiff had purchased many liability, theft and home insurance policies in said period of time from the defendant, Kroll and through the defendant, Agency; that said farm liability insurance policies were the first such farm policies that the plaintiff had purchased and that the farms insured therein were the

first farms ever owned or operated by the plaintiff; that said policies were ordered by telephone conversations between the defendant Kroll and the plaintiff, that the plaintiff requested full protection and coverage that would protect him from liability claims in the operation and maintenance of his farms and that it was agreed and warranted by the defendant, Kroll, that such a policy would be written and issued to the plaintiff; that no application for a policy was ever so sent or tendered to the insured and that the extent of insurance coverage was never mentioned, but the defendant Kroll took it upon himself to issue a policy in the amount of \$25,000.00 which figure is 2 1/2 times the minimum coverage on such policies, but that through error and mutual mistake of fact said defendant Broker failed to list in the policy application the number of employees, resident and non-resident, full and part-time to be used in the operation of said farm, and that through said error and mistake the policy when issued failed to list such employees in the declarations of the policy and by reason of said mutual mistake and error the defendant, Insurance Company, disclaimed insurance coverage after receiving due notice from the plaintiff of the accident and liability claim against him; that it was the intent of the defendant Broker and the plaintiff insured to extend such coverage protecting the insured from such claims of employees in the operation of the farm, and that said additional coverage added about \$3.00 to the cost of the premium which fact was not of consequence to the plaintiff or to the defendants; that such policy was in effect for a period of 2 1/2 years (the original policy having been renewed twice). If said employee coverage was entered in the declaration of the policy and an additional nominal premium was paid, the plaintiff would have been fully protected from the claim of said Nicholson as aforementioned. It was the belief and understanding of the plaintiff insured and the defendant Kroll, from the date of April 3, 1953, the date that the first "Farmer's Comprehensive Personal Liability Policy" was issued by and through the defendants to the plaintiff, that the plaintiff was fully protected and insured, and including insurance protecting the plaintiff against liability

resulting from claims against him by farm employees, i.e., the liability claim asserted against him by the aforesaid John Nicholson.

WHEREFORE, the premises considered, plaintiff Paul V. Finegan prays:

1. That by reason of mutual mistake and error of the plaintiff and the defendant, Broker, individually and as agent and/or officer of defendant Agency and as agent for the defendant Insurance Company, that said insurance policy of the defendant, Lumbermens Mutual Casualty Company, No. 5L 349-795, be reformed to reflect the true intent of the parties regarding the scope of liability coverage contemplated by said parties at the time the contract was entered into regarding that said policy, that said policy would include in its covering provisions and declarations coverage (A) and (B) listing employees used in the operation and maintenance of the farm listed in said policy, and that, upon such reformation, and in view of the claim and suit for damages against the plaintiff and the disposition of the same by the plaintiff, that plaintiff have judgment against the defendants and each of them under said policy of insurance in the amount of \$12,001.51, i.e., the actual costs including attorney's fees that the insured was required to pay in order to satisfy the claim of John Nicholson.

2. For such other further and general relief as the nature of the case may require.

COUNT III
(Negligence)

1. The plaintiff incorporated by reference all the facts and allegations contained in paragraphs 1 through 7 of COUNT I of this complaint.

2. That the defendant, Broker, while acting individually as agent and/or officer of defendant Agency and as agent for the defendant Insurance Company, was negligent in the writing and issuing of said policy of insurance in that said defendant, Broker, did not as an insurance broker and salesman inquire into the extent of coverage needed by the plaintiff herein that the defendant, Broker, knew or should have known that the plaintiff as a farmer would from time to time have employees

in the use and maintenance of the farm or farms named in the said policies issued to the plaintiff and that the plaintiff relying on the skill, experience and specialized knowledge of insurance of the defendant, Kroll, individually as agent and/or officer of defendant Agency as an agent for the defendant Insurance Company, which reliance was acquired over a period of 20 years of dealing with said defendant Broker, did not know or have reason to believe that the policy as issued did not include coverage to protect him against liability claims of his employees and in fact was lead to believe and rely, that he did have such insurance protection because of the assurance given him by the defendant, Kroll, that he was "fully covered" and that such reliance and belief continued on part of the insured from the time of the issuance of the first such policy and through such period of time that such policy was renewed for two additional years. That all premiums on said policies were duly paid by the insured. As a result of said negligence of the defendant Broker, individually as agent and/or officer of defendant Agency and as agent for the defendant Insurance Company, the plaintiff suffered damages to the extent of \$12,001.51, plus interest and costs and attorney's fees to be incurred as a result of this cause aforementioned in paragraph (7) of this complaint.

WHEREFORE, the premises considered, plaintiff Paul V. Finegan prays:

1. For a judgment of \$12,001.51, plus interest and costs against the defendants and each of them for negligence.
2. For such other, further and general relief as the nature of the case may require.

/s/ Thomas G. Laughlin
Attorney for Plaintiff
927 - 15th Street, N.W.
Washington, D.C.

DEMAND FOR A JURY TRIAL

Plaintiff demands a trial by jury of all issues in the above entitled cause.

/s/ Thomas G. Laughlin
Attorney for Plaintiff

STATE OF MARYLAND)
) ss
COUNTY OF MONTGOMERY)

Paul V. Finegan, plaintiff in the foregoing Complaint, of lawful age and being first duly sworn upon oath, deposes and says:

That he has read and understands the foregoing Complaint and the Exhibit attached thereto; that the statements of fact therein contained and reflected true and correct, and that the Exhibit so attached is a true and correct copy of the original thereof.

/s/ Paul V. Finegan

[JURAT: January 9, 1960]

(SEAL)

Short Rate Cancellation Table
For One Year Policies

Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium
1	5%	154-156	53%
2	6	157-160	54
3-4	7	161-164	55
5-6	8	165-167	56
7-8	9	168-171	57
9-10	10	172-175	58
11-12	11	176-178	59
13-14	12	179-182 (6 mos.)	60
15-16	13	183-187	61
17-18	14	188-191	62
19-20	15	192-196	63
21-22	16	197-200	64
23-25	17	201-205	65
26-29	18	206-209	66
30-32 (1 mo.)	19	210-214 (7 mos.)	67
33-36	20	215-218	68
37-40	21	219-223	69
41-43	22	224-228	70
44-47	23	229-232	71
48-51	24	233-237	72
52-54	25	238-241	73
55-58	26	242-246 (8 mos.)	74
59-62 (2 mos.)	27	247-250	75
63-65	28	251-255	76
66-69	29	256-260	77
70-73	30	261-264	78
74-76	31	265-269	79
77-80	32	270-273 (9 mos.)	80
81-83	33	274-278	81
84-87	34	279-282	82
88-91 (3 mos.)	35	283-287	83
92-94	36	288-291	84
95-98	37	292-296	85
99-102	38	297-301	86
103-105	39	302-305 (10 mos.)	87
106-109	40	306-310	88
110-113	41	311-314	89
114-116	42	315-319	90
117-120	43	320-323	91
121-124 (4 mos.)	44	324-328	92
125-127	45	329-332	93
128-131	46	333-337 (11 mos.)	94
132-135	47	338-342	95
136-138	48	343-346	96
139-142	49	347-351	97
143-146	50	352-355	98
147-149	51	356-360	99
150-153 (5 mos.)	52	361-365 (12 mos.)	100

PRINTED IN U.S.A.

LUMBERMENS MUTUAL CASUALTY COMPANY (A MUTUAL INSURANCE COMPANY. HEREIN CALLED THE COMPANY)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

1. Coverage A—Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof.

Coverage B—Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident,

- while on the premises with the permission of an insured, or
- while elsewhere if such injury, sickness or disease (a) arises out of the premises or a condition in the ways immediately adjoining, (b) is caused by the activities of an insured, (c) is caused by the activities of or is sustained by a farm or residence employee while engaged in the employment of an insured, or (d) is caused by an animal owned by or in the care of an insured.

Coverage C—Animal Collision. To pay for loss by death of any cattle, horse or hybrid thereof, hog, sheep or goat owned by an insured caused by collision between such animal and a motor vehicle not owned or operated by an insured or any employee thereof, while such animal is within a public highway and is not being transported.

II. Defense, Settlement, Supplementary Payments. As respects the insurance afforded by the other terms of this policy under Coverage A the company shall:

- defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish any such bonds;
- pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;
- pay expenses incurred by the insured, in the event of an accident causing bodily injury to or sickness or disease of any person other than a farm employee, for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;
- reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

III. Definition of Insured. The unqualified word "insured" includes (a) the named insured, (b) if residents of his household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of an insured, and (c) with respect to animals and watercraft owned by an insured, any person or organization legally responsible therefor, and (d) with respect to farm tractors and trailers and self-propelled or motor or animal drawn farm implements, any employee of an insured while engaged in the employment of the insured.

IV. Premises, Business, Farm Employee, Residence Employee, Automobile Defined.

(a) Premises. The unqualified word "premises" means (1) all premises where the named insured or his spouse maintains a farm or residence and includes private approaches thereto and other premises and private approaches thereto for use in connection with said farm or residence, except business property; (2) individual or family cemetery plots or burial vaults, (3) premises in which an insured is temporarily residing, if not owned by an insured, and (4) vacant land, other than farm land rented to others, owned by or rented to an insured, including such land on which a one or two family dwelling or farm structure is being constructed for the insured by independent contractors.

"Farm" includes all farm structures and residences thereon.

"Business property" includes (1) property on which a business is conducted, and (2) property rented in whole or in part to others, or held for such rental, by the insured other than (a) the insured's residence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) garages or stables, if not more than three car spaces or stalls are so rented or held.

(b) Business. "Business" includes trade, profession or occupation, other than farming and roadside stands maintained principally for the sale of the insured's produce.

(c) Farm Employee. "Farm employee" means an employee of an insured whose duties are incidental to the ownership, maintenance or use of the farm premises, including the maintenance or use of automobiles or teams.

(d) Residence Employee. "Residence employee" means an employee of an insured, other than a farm employee, whose duties are incidental to the ownership, maintenance or use of the premises, other than farm premises, including the maintenance or use of automobiles or teams, or who performs elsewhere duties of a similar nature not in connection with an insured's business.

(e) Automobile. "Automobile" means a land motor vehicle, trailer or semitrailer, other than crawler or farm-type tractors, farm implements and, if not subject to motor vehicle registration, any equipment which is designed for use principally off public roads.

V. Policy Period. This policy applies only to occurrences during the policy period.

EXCLUSIONS

This policy does not apply:

- (a) under Coverages A and B, to any business pursuits of an insured, other than activities therein which are ordinarily incident to non-business pursuits; or to the rendering of any professional service or the omission thereof; or to any act or omission in connection with premises, other than as defined, which are owned, rented or controlled by an insured;
- (b) under Coverages A and B, to (1) automobiles while away from the premises or the ways immediately adjoining, except under coverage A with respect to operations by independent contractors for non-farming or non-business purposes of an insured, (2) farm tractors, trailers, implements, draft animals or vehicles for use therewith, while used under contract to others for a charge, (3) watercraft twenty-six feet or more in over-all length, or with more than ten horse power, owned or rented to an insured, while away from the premises, or (4) aircraft, or the loading or unloading of any of the foregoing; but, with respect to injury sustained by a farm or residence employee while engaged in the employment of the insured, parts (1), (2) and (3) of this exclusion do not apply, and part (4) applies only while such employee is engaged in the operation or maintenance of aircraft;
- (c) under Coverages A and B, to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured;
- (d) under Coverages A and B, to bodily injury to or sickness, disease or death of (1) any farm employee while engaged in the employ-

ment of the insured unless farm employees are specifically declared in this policy; (2) any employee of the insured while engaged in the employment of the insured, if benefits therefor are either payable or required to be provided under any workmen's compensation law; or (3) and residence employee of the insured while engaged in the employment of the insured if the insured has in effect on the date of the occurrence a policy providing workmen's compensation benefits for such employee;

- (e) under Coverage A, to liability assumed by the insured under any contract or agreement except (1) liability of others assumed under a written contract relating to the premises or (2) a warranty of goods or products;
- (f) under Coverage A, to injury to or destruction of (1) property used by, rented to or in the care, custody or control of the insured, or (2) any goods or products manufactured, sold, handled, or distributed by an insured, or work completed by or for an insured, out of which the injury or destruction arises;
- (g) under Coverage B, to bodily injury to or sickness, disease or death of (1) any person if benefits therefor are payable under any workmen's compensation law; or (2) any insured within the meaning of parts (a) and (b) of Insuring Agreement III; or (3) any person, other than residence employees or farm employees, when declared in this policy, if such person is regularly residing on the premises, or is on the premises because of a business conducted thereon, or is injured by an accident arising out of such business, or is engaged in work incidental to the maintenance or use of the farm premises.

CONDITIONS

1. Premium. The premium for insurance with respect to injury to farm employees is an estimated premium only. After each anniversary and upon termination of this policy, the named insured shall notify the company of any change during the policy period in the number of farm in-servants and in the remuneration earned by other farm employees; and the earned premium for such insurance shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid for such insurance, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by said insured.

2. Inspection and Audit. The company shall be permitted to inspect the insured premises and operations and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

3. Limits of Liability. The limit of liability stated in the declarations for Coverage A is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of one occurrence.

The limit of liability stated in the declarations for Coverage B is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

4. Notice of Occurrence. When an occurrence takes place written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence, the names and addresses of the injured and of available witnesses.

5. Notice of Claim or Suit. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

6. Assistance and Cooperation. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

7. Medical Reports; Proof and Payment of Claim. As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

8. Insured's Duties When Loss Occurs. When loss occurs, the owner shall give notice thereof as soon as practicable to the company or any of its authorized agents, file proof of loss with the company within sixty days after the occurrence of loss, and cooperate with the company in all matters pertaining to the loss and claim.

9. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

10. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

11. Other Insurance. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

12. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

13. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized officer or representative of the company.

14. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon. Death of the named insured terminates this policy unless within sixty days after such death written notice is given to the company designating a named insured, in which event the person so designated becomes the named insured from the date of such death. If the person so designated was not an insured at the time of the death of the named insured, this policy shall apply to such person only with respect to the premises of the original named insured and those of his spouse, and shall cover as insured, while a resident of said premises, any person who was an insured prior to the death.

15. Cancellation. This policy may be cancelled by the named insured by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

16. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

17. Mutual Policy Conditions. This is a perpetual mutual corporation owned by and operated for the benefit of its members. This is a non-assessable, participating policy under which the Board of Directors in its discretion may determine and pay unabsorbed premium deposit refunds (dividends) to the insured.

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17. **Mutual Policy Conditions.** This is a perpetual mutual corporation owned by and operated for the benefit of its members. This is a non-assessable, participating policy under which the Board of Directors in its discretion may determine and pay unabsorbed premium deposit refunds (dividends) to the insured.

IN WITNESS WHEREOF, the LUMBERMENS MUTUAL CASUALTY COMPANY has caused this policy to be signed by its President and Secretary at Chicago, Illinois, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized representative of the company.

H. L. Tennison
Secretary

W. G. Lempert
President

**FARMER'S COMPREHENSIVE PERSONAL LIABILITY POLICY
(AMENDMENT OF AUTOMOBILE DEFINITION AND WATERCRAFT EXCLUSION)**

It is agreed that with respect to the insurance under the Liability Coverage and the Medical Payments Coverage the policy is amended as follows:

1. The definition of "Automobile" is amended to read:

"Automobile. 'Automobile' means a land motor vehicle, trailer or semitrailer, other than crawler or farm-type tractors, farm implements and, if not subject to motor vehicle registration, any equipment which is designed for use principally off public roads."

2. Sub-paragraph (3) of Exclusion (b) is amended to read:

"(3) watercraft twenty-six feet or more in over-all length, or with more than ten horse power, owned or rented to an insured, while away from the premises, or"

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The effective date and hour of this endorsement is stated below and reference to hour shall be Standard Time at the address of the employer or named insured as stated in the policy. This endorsement shall terminate with the policy.

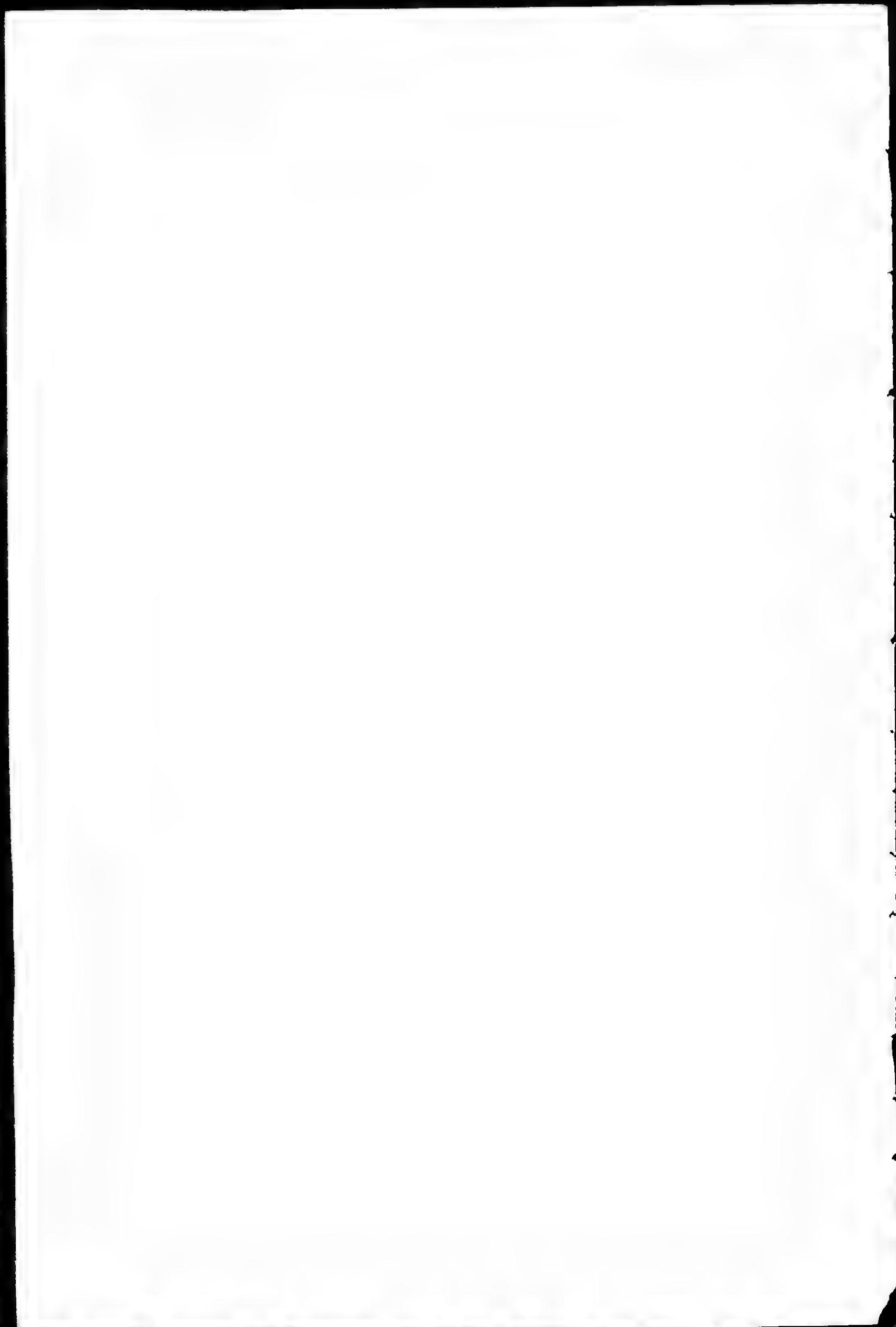
This endorsement is subject to the declarations, conditions, exclusions, and other terms of the policy which are not inconsistent herewith, and when countersigned by an authorized representative of the company, forms a part of the policy described below.

LUMBERMENS MUTUAL CASUALTY COMPANY

W. G. Lempert
President

ISSUED TO PAUL V. FINEGAN			POLICY EFFECTIVE MONTH DAY YEAR APRIL 2, 1966			AGENCY NUMBER 501
POLICY NUMBER 1-1-1-1-1	ENDORSEMENT NO. 1	ENDORSEMENT EFFECTIVE HOUR MONTH DAY YEAR 12:01 A. M. APRIL 2, 1966	COUNTERSIGNATURE OF LICENSED RESIDENT AGENT			
COUNTERSIGNED AT 1000 S. MADISON		COUNTERSIGNATURE DATE MONTH DAY YEAR MARCH 18, 1966	<i>Claude J. Hyman</i>			

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[Filed March 4, 1960]

**ANSWER OF DEFENDANTS MUTUAL INSURANCE AGENCY,
INC. AND JOHN H. KROLL TO COMPLAINT**

First Defense

The complaint fails to state a claim against defendants Mutual Insurance Agency, Inc. and John H. Kroll upon which relief can be granted.

Second Defense

With respect to Count I, these defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2; admit the allegations of paragraphs 3, 4 and 5; admit that on the date alleged in paragraph 6, a policy of insurance known as a Farmer's Comprehensive Personal Liability Policy No. 5L 349-795 was issued through defendant Mutual Insurance Agency, Inc. to plaintiff, for the periods set forth in said paragraph, and admit that some of the provisions thereof are contained in said paragraph; aver that the allegations of paragraph 7 pertain only to defendant Lumbermens Mutual Casualty Company and that these defendants need not answer thereto; but if answer is required, these defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

With respect to Count II, paragraph 1, these defendants adopt by reference and incorporate herein their answers and defenses to paragraphs 1 through 7 of Count I; admit that on the date alleged in paragraph 2 plaintiff and defendant Kroll engaged in a conversation regarding proposed fire insurance coverage on plaintiff's farm properties and admit that defendant Kroll suggested that plaintiff take out a farmer's liability policy; admit that plaintiff purchased a farmer's comprehensive personal liability policy and that the renewal of said policy is involved here; admit that defendant Kroll is a licensed insurance broker and agent and officer of defendant Mutual Insurance Agency; deny that defendant Mutual Insurance Agency is a general insurance agency for defendant Lumbermens Mutual Casualty Company, but admit that it is an agent therefor;

admit that plaintiff has done business with these defendants for nearly twenty years, or since 1943; and that plaintiff has purchased many other types of insurance policies during said period; aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that said farm liability policies were the first such policies purchased by plaintiff and that the farms insured were the first farms owned or operated by plaintiff; admit that said policies were ordered by telephone between defendant Kroll and plaintiff; deny that plaintiff requested full protection and coverage that would protect him from all liability claims, and aver that defendant Kroll and plaintiff discussed "employee" coverage for said policy which was rejected by plaintiff; deny that through error and mutual mistake said defendant Kroll failed to provide "employee" coverage; deny that it was the intent of defendant Kroll and plaintiff to extend "employee" coverage in the operation of plaintiff's farm; aver that said additional premium therefor would be Twenty-three Dollars (\$23.00); admit that if said coverage was requested by plaintiff and entered in a declaration of the policy for the said premium, plaintiff would be protected from the claim of said Nicholson, as alleged; deny the remaining allegations of said paragraph and, therefore, deny the relief sought.

With respect to Count III, paragraph 1, these defendants adopt by reference and incorporate herein their answers and defenses to paragraphs 1 through 7, inclusive, of Count I; deny the allegations of paragraph 2; and deny each and every other allegation in the complaint not hereinbefore specifically answered.

Third Defense

The claims asserted against defendants Mutual Insurance Agency, Inc. and John H. Kroll are barred by the Statute of Limitations.

/s/ Charles E. Pledger, Jr.

/s/ John F. Mahoney, Jr.

Attorneys for Defendants Mutual
Insurance Agency, Inc. and John H. Kroll

* * *

[Certificate of Service]

[Filed April 4, 1960]

REQUEST FOR ADMISSIONS

Defendants Mutual Insurance Agency, Inc. and John H. Kroll, pursuant to Rule 36 of the Federal Rules of Civil Procedure, request the following admissions of fact from plaintiff within ten (10) days after service of this request upon you.

1. Plaintiff notified defendant Lumbermens Mutual Casualty Company of the accident of January 2, 1956, involving one John H. Nicholson of Middle Brooke Hill, Gaithersburg, Maryland, on or about January 4, 1956.

2. By letter dated January 16, 1956, sent by registered mail, a true copy of which is attached hereto and marked "Exhibit A", defendant Lumbermens Mutual Casualty Company disclaimed coverage under its policy for this accident.

3. Plaintiff replied to aforesaid letter of Lumbermens Mutual Casualty Company by letter dated January 20, 1956, to Lumbermens Mutual Casualty Company, a true copy of which is attached hereto and marked "Exhibit B".

4. There was no subsequent correspondence or communication otherwise between plaintiff and any of the defendants which in any way modified, altered or changed the said Insurance Company's position with respect to its disclaimer of coverage as stated in "Exhibit A".

5. There has been no suit or other proceeding instituted against defendants Mutual Insurance Agency, Inc. and John H. Kroll involving the policy of insurance attached to the complaint prior to the filing of the action herein on January 12, 1960.

Pleadgee, Edgerton & Richardson

/s/ John F. Mahoney, Jr.

* * *

Attorneys for Defendants Mutual Insurance Agency, Inc. and John H. Kroll

[Certificate of Service]

EXHIBIT A

Encl. John Kroll, Mutual Insurance Agency
H , J. J. Deegan, Chicago

REGISTERED MAIL
RETURN RECEIPT REQUESTED

January 16, 1956

Mr. Paul V. Finegan
R. F. D. #3
Gaithersburg, Maryland

Dear Mr. Finegan:

54-L-4957-X
NICHOLSON VS. FINEGAN
Accident: 1/2/56

Investigation of this accident indicates that our policy does not cover this situation. We regret that we can not furnish coverage in this case.

The reason for this disclaimer is that a farm employee is not afforded coverage while engaged in the employment of the insured unless farm employee is specifically declared in this policy. In this instance your employee is not declared.

In stating the above reason for disclaimer we do not intend to waive any other defense we may have under this policy.

We recommend that you retain counsel to look after your interests and to defend you in the event that any suits or actions are brought against you.

Very truly yours,

/s/ A. J. Mayer, Jr.

A. J. Mayer, Jr.
Claim Department

REGISTERED NO. 627059

54-L-4957-X

Value: N.V. Rept. receipt fee \$.07

Fee \$.40

Postage: \$.03

From: Kemper Insurance
1301 H St. N.W.

To: Mr. Paul V. Finegan
R. 3 Gaithersburg, Md.

POSTMARK
dated Jan. 17, 1956
Washington, D. C.
Central Station

Post Office Department

* * *

54L-4957-X

Postmark

Date Jan. 18 - 1956

5 PM

Gaithersburg, Md.

Return to: Lumbermens Mutual Casualty Co.
(Name of Sender)

1301 H St., Washington, D.C.

Registered Article

No. 627059

Washington, D.C.

* * *

RETURN RECEIPTReceived from the Postmaster the Registered or Insured Article, the
number of which appears on the face of this Card.

Paul V. Finegan (Signature of name of addressee)

Paula Francis Finegan (Signature of addressee's agent)

Date of delivery: 1-18-1956

EXHIBIT BLumbermens Mutual Casualty Company
Chicago, Illinois

Route #3

Gaithersburg, Maryland

January 20, 1956

Lumbermens Mutual Casualty Company
1301 H Street N.W.
Washington 5, D.C.

[Handwritten]

Attention Mr. Royce C. Rowe V.P.

Attention: Mr. A. J. Mayer, Jr.
Claim Department

Re:

54-L-4957-X

Nicholson v. Finegan

Accident: 1/2/56

Gentlemen:

Since receiving your letter of January 16, 1956, I have made a preliminary study which indicates that your policy No. 5LL-349,795 covers this situation to the extent of the limits of liability set forth therein.

You seem to rely for the most part on the policy provision that a farm employee is not covered unless he is specifically declared in the policy.

The policy defines "farm employee" as "an employee of an insured whose duties are incidental to the ownership, maintenance or use of the farm premises, including the maintenance or use of automobiles or teams."

In the instant case the claimant is not an employee of any kind, farm, industrial, or otherwise. According to the authorities cited in Words and Phrases, Permanent Edition, Volume 14, an "employee," as ordinarily used, signifies permanent employment and does not include a person whose employment is purely casual. Mr. Nicholson was merely giving me some casual help with a tractor at the time of the accident.

You might also be interested in State Farm Mutual Automobile Insurance Company v. Brooks, CCA No. 136 F.2d 807, 810, 811, 812, which held that the word "employee," as used in a liability policy excluding insured's employees from coverage, was subject to interpretation by the Courts to the extent that it would not be deemed absolutely inclusive of every person who might happen at the time of accident to be rendering some service to the insured.

Your early reconsideration of this matter will be appreciated. I am sure it is not your desire to put me in the position of further expense to engage counsel to further pursue this point with you.

This should be especially true in my case since I have been a "Lumbermens" assured for many years to the extent of having paid thousands of dollars in premiums. A copy of this letter has been sent to your home office for any interim action it might desire to take in this case since it is my informal understanding the initial ruling was made at home office level. A copy is also being sent to the Mutual Insurance Agency, Inc., of Washington, D.C. with whom I have carried considerable insurance for at least the past sixteen years.

Sincerely yours,

/s/ Paul V. Finegan

[Filed April 8, 1960]

**ANSWER OF PLAINTIFF TO DEFENDANT'S
"REQUEST FOR ADMISSIONS OF FACTS"**

Comes now the Plaintiff, Paul V. Finegan, and for an Answer to the "Request for Admissions of Fact" filed herein by the defendants Lumbermens Mutual Casualty Company and the Mutual Insurance Agency, Inc., under oath states,

Request 1. Yes, I notified John H. Kroll by telephone on Jan. 3, 56.

Request 2. Yes, but a claims agent of Lumbermens Insurance Company took a statement from me on January 4, 1956 and told me then that there might be a question of coverage.

Request 3. Yes.

Request 4. No, there was no further change of position on part of the insurance company.

Request 5. Yes, no litigation was filed against Mr. Kroll or the Mutual Insurance Agency, Inc. until the filing of this cause.

/s/ Paul V. Finegan

[JURAT]

/s/ Thomas G. Laughlin
Atty. for Plaintiff

[Certificate of Service]

[Filed October 25, 1960]

**MOTION OF THE DEFENDANT LUMBERMENS
MUTUAL CASUALTY COMPANY FOR SUMMARY
JUDGMENT**

Defendant Lumbermens Mutual Casualty Company moves the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for reason therefor says:

1. The causes of action asserted in the complaint against this defendant accrued more than three years preceding the filing of the complaint herein and are therefore barred by the statute of limitations.

2. The claim described in the complaint is excluded under the terms of the policy issued to the plaintiff by the defendant and therefore is not covered by said policy.

Brault and Graham

/s/ Albert E. Brault
Attorneys for Defendant Lumbermens
Mutual Casualty Company

* * *

[Certificate of Service]

[Filed October 25, 1960]

STATEMENT OF MATERIAL FACTS

Defendant Lumbermens Mutual Casualty Company contends that there is no genuine issue as to the following facts:

1. The facts stated in the Statement of Material Facts filed herein by the defendants Mutual Insurance Agency and John H. Kroll.

2. That a suit was filed by the plaintiff against the defendant Lumbermens Mutual Casualty Company in the Circuit Court for Montgomery County claiming substantially the same relief sought herein in Count I of this Complaint, however, said action was dismissed without prejudice by the plaintiff and therefore is not pending at this time.

3. That the injured person, namely John Nicholson, was injured on January 2, 1956 while engaged as a farm employee on the farm of the plaintiff, it being so stated in Paragraph 7 of Count I of the Complaint filed herein and admitted in the Answer filed by this Defendant.

Brault and Graham

By /s/ Albert E. Brault
Attorneys for Defendant Lumbermens
Mutual Casualty Company

[Certificate of Service]

[Filed October 25, 1960]

MOTION OF DEFENDANTS MUTUAL INSURANCE AGENCY,
INC. AND JOHN H. KROLL FOR SUMMARY JUDGMENT

Defendants Mutual Insurance Agency, Inc. and John H. Kroll move the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for reason therefor say:

The causes of action asserted in the complaint against these defendants accrued more than three (3) years preceding the filing of the complaint and they are therefore barred by the Statute of Limitations.

Pledger & Edgerton

By /s/ Charles E. Pledger, Jr.

/s/ John F. Mahoney, Jr.

* * *

Attorneys for Defendants Mutual Insurance Agency, Inc. and John H. Kroll

TO: Thomas G. Laughlin, Esq.
927 - 15th Street, N.W.
Washington 5, D.C.
Attorney for Plaintiff

PLEASE TAKE NOTICE that memorandum of points and authorities in support of this motion and statement of material facts are attached hereto. The rules of the Court require that if you oppose the granting of this motion you shall file with the Clerk of this Court within five (5) days of the date of service of a copy of this motion upon you, or within such further time as the Court may grant or as the parties to this suit may agree upon, the statement of points and authorities upon which you rely and serve a copy thereof upon counsel for defendants.

/s/ John F. Mahoney, Jr.

[Certificate of Service]

[Filed October 25, 1960]

STATEMENT OF MATERIAL FACTS

Defendants Mutual Insurance Agency, Inc. and John H. Kroll contend that there is no genuine issue as to the following facts:

1. On January 2, 1956, there was in full force and effect a policy of insurance known as Farmer's Comprehensive Personal Liability policy, issued by defendant Lumbermens Mutual Casualty Company through defendant Mutual Insurance Agency, Inc. and defendant John H. Kroll as its President to plaintiff.

2. Plaintiff notified defendant Lumbermens Mutual Casualty Company of an accident of January 2, 1956, involving one John H. Nicholson of Middle Brooke Hill, Gaithersburg, Maryland, on January 3, 1956, thereby presenting a claim under said policy.

3. Defendant Lumbermens Mutual Casualty Company disclaimed coverage under the aforesaid policy by letter dated January 16, 1956, which was received by plaintiff on January 18, 1956, a true copy of which is filed herein as Exhibit "A".

4. Plaintiff replied to Exhibit "A", a true copy of the reply being filed herein and marked Exhibit "B".

5. There was no subsequent correspondence or communication otherwise between plaintiff and any of the defendants which in anyway modified, altered or changed the said insurance company's position with respect to its disclaimer of coverage.

6. There has been no suit or other proceeding instituted against defendants Mutual Insurance Agency, Inc. and John H. Kroll involving the policy of insurance attached to the complaint prior to the filing of the action herein on January 12, 1960.

Pledger & Edgerton

By /s/ Charles E. Pledger, Jr.

/s/ John F. Mahoney, Jr.

* * *
Attorneys for Defendants Mutual
Insurance Agency, Inc. and
John H. Kroll

[Certificate of Service]

EXCERPTS FROM DEPOSITION OF PAUL V. FINEGAN

1

Washington, D.C.
Thursday, Feb. 23, 1961

* * * * *

2

PAUL V. FINEGAN

the plaintiff, was called for examination by counsel for the defendants, and after having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE DEFENDANT LUMBERMENS
MUTUAL CASUALTY COMPANY

BY MR. BRAULT:

Q. Would you state your full name, please, sir? A. Paul Vincent Finegan.

Q. Your home address? A. 5924 Bradley Boulevard, Bethesda 14, Maryland.

Q. And how old are you, sir? A. Fifty-five.

3

Q. What is your occupation? A. Federal employee.

Q. In what capacity? A. Administrative work.

Q. Administrative work? A. That's right.

Q. In what department? A. Post Office Department.

Q. Would you tell us your educational background, what education you had as a young man? A. Yes, sir. I finished High School and went to George Washington School of Arts and Science for several years, and then I branched over and I took law finally receiving an A.B., and an LLB.

Q. You received a Bachelor of Laws Degree and a Bachelor of Arts Degree both from George Washington University? A. No, sir.

Q. Where did you get your Bachelor of Arts Degree? A. National University.

Q. And your Bachelor of Laws? A. National University.

Q. And when did you receive your Bachelor of Laws Degree, what year? A. 1935.

Q. Were you ever admitted to the Bar? A. Yes, sir.

4 Q. To what Bar were you admitted? A. D.C.

Q. When were you admitted to the D.C. Bar? A. '35.

* * * *

Q. Have you ever engaged in the practice of law? A. No, sir.

* * * *

8 Now, in 1956, to be specific, sir, January 2, 1956, did you own a farm in Montgomery County? A. Yes, sir.

Q. And by whom was that farm owned, if anyone, other than yourself? Was it owned jointly by you -- A. Mrs. Finegan and I owned it.

Q. You owned it jointly? A. Yes.

Q. What is her name, sir? A. Gladys.

Q. And is that the farm on which John Nicholson was then employed?

A. Yes, sir.

Q. When did you first acquire this farm? A. 1953.

* * * *

10 A. Initially it was twenty acres, ultimately it was around thirty-five and a half to thirty-six acres.

Q. When you purchased the farm from Mr. and Mrs. Lanier it contained about twenty acres? A. That's true.

* * * *

21 Q. Did you at any time obtain any employees on your Muddy Branch Road Farm? A. Yes, sir.

Q. When did you first acquire or engage anyone to do any work on your Muddy Branch Road Farm? A. As I recall the first time was 1954 around Easter time.

* * * *

43 MR. BRAULT: Perhaps to be on the safe side maybe I ought to exhibit to you the photostatic copy that was attached to the copy of the complaint by your counsel so there won't be any misunderstanding about its being a true copy.

Mr. Laughlin, I have just removed this photostatic copy from the

carbon copy of the complaint which you filed in this case. This is a photostat that you attached, isn't it?

MR. LAUGHLIN: I can't state whether that is the same one, but it certainly looks like it, Mr. Brault. It looks identical with this (indicating). Is there any difference between Exhibit No. 1 and what you are holding in your hand?

MR. BRAULT: No. This one was served on the Mutual Insurance Agency.

44 MR. LAUGHLIN: It is identical with what you have, sir?

MR. BRAULT: Yes.

BY MR. BRAULT:

Q. Would you look at that, sir, and does that appear to be the same form of policy which you received in 1953? A. This is not the one I received in '53, this is the one for '55, but it --

Q. I am speaking of the form? A. The form I wouldn't know without checking it, but it is a typical insurance company attachment, I don't know.

Q. Assuming that this is the same form that was issued to you in April 1953, can you tell us what portions of that policy you looked at when it was first received? A. I looked at the top here (indicating).

Q. Now, that is the printing and typing under item one (1) on the front page? A. Items one (1), two (2), and three (3).

Q. You looked at all three of those items? A. Yes, sir.

Q. And you read them? A. Yes, sir. I read the typed portions.

Q. Did you look at the section just below item three (3) which discloses the amount of the premium and the limits of liability and cover-
45 ages? A. No, sir.

Q. You weren't concerned with how much liability coverage you had? A. No, I was going on the assumption when John told me I would be covered on it I was covered on it.

Q. You looked and read items one (1), two (2), and three (3), but did not see the items --

* * * * *

Q. I want to make certain. Mr. Finegan, are you saying that you read items one (1), two (2), and three (3), but did not read the information just below item three (3) of the face of this policy? A. No, sir.

Q. You did not read it, you say? A. I read the typed portion in item one (1), the full thing, and item two (2), and then item three (3), that's the typed portion there, and then the typed portions here (indicating).

46 That is all I read.

Q. You read item three (3), didn't you? A. April 3, 1955 to April 3, 1956.

Q. You didn't read the printed portion under item three (3)? A. No, sir.

Q. You didn't read it to determine what the limits of liability were? A. No, sir. I had no reason to.

Q. Nor the amount of medical payment? A. No, sir.

Q. Did you, when you purchased your policy, that is your farmers comprehensive personal liability policy in April 1953, advise Mr. Kroll that you had employees working for you? A. No, sir.

Q. And the policy was automatically renewed in April 1954? A. That's right.

Q. And a new policy was then delivered to you, was it? A. Yes, sir.

Q. That was similar to the first one? A. Yes, sir.

47 Q. Did you look at it when it was recieved? A. Only to the same extent as I looked at the first policy.

Q. And is that the only extent to which you looked at the insurance policies that you purchased? A. Yes, sir.

Q. When the policy was renewed in April 1954, which would have been April 3rd, wasn't it? A. Yes, sir.

Q. Was Mr. Nicholson working for you at that time? A. I don't know.

Q. Did you advise Mr. Kroll or anyone at the Mutual Insurance Agency that you had taken on an employee on the Muddy Branch Road Farm? A. No, sir.

Q. Did you at any time ever advise the Mutual Insurance Agency that you had engaged an employee and that you had someone working for you on that farm? A. No, sir.

Q. When you did hire Mr. Nicholson to come to work for you on the Muddy Branch Road Farm, did you make any inquiry of anyone regarding insurance coverage for this employee? A. No, sir.

Q. Did you make any inquiry regarding insurance coverage for the employees on the Hughes Road Farm of anyone? A. No, sir.

48 Q. You made no such inquiry? A. No, sir.

Q. Either at the time you purchased the farm or subsequent to its acquisition? A. That's right.

* * * * *

49 Q. Mr. Finegan, Mr. Nicholson was injured on January 2, 1956, is that correct? A. Yes, sir.

Q. When did you report this injury and accident to Mr. Nicholson to any insurance company? A. The first thing the next workday.

Q. To whom did you make the report? A. John Kroll.

Q. How did you make the report? A. Telephoning.

Q. Do you recall what conversation you had with him at that time? A. He said he would send someone out and take a statement from me.

Q. Was that the only conversation you had with him regarding the incident at that time? A. At that time?

Q. Yes. A. Yes, sir.

Q. And did you hear from anyone else representing the agency or the Lumbers Mutual Casualty Company subsequent to your report to

50 Mr. Kroll? A. Yes, sir.

Q. When did you next hear from anyone at all? A. About two days later.

Q. And who was that? A. It was one of their employees, James Hane, he came to my residence in Gaithersburg.

* * * * *

53 Q. Now, you received a letter, did you not, dated January 16,

1956, which was signed by A. J. Mayer of the Claims Department of Lumbermens Mutual Casualty Company? A. Prior to that time I went down.

Q. You went to the office yourself? A. I went to the Claims Office.

Q. Prior to January 16, 1956? A. Yes, sir.

Q. Who did you see there? A. I don't have my records with me,
54 but I saw the head man in the Claims Department. At one time I know I talked with Mr. Mayer and another time I know I talked with Mr. Robinson.

Q. Can you recall the conversations you had in substance with Mr. Robinson and Mr. Mayer about this matter? A. First of all, I had received the first bill from the Suburban Hospital for Johnny's care, Johnny Nicholson's care, and upon receiving that I went down and I talked with them in the Claims Office about that. I told them that he would be in there for a longer period of time, that it was a serious accident, and I could expect larger bills on it in the future.

I left statements, that is bills, from the Suburban Hospital with them and I would say they were noncommittal as to whether they were going to pay or not.

Q. Was there any discussion then on the subject of coverage?
A. No, sir.

Q. You mean the subject wasn't brought up either by you or Mr. Robinson or Mr. Mayer at any time on those two visits? A. No, sir.

Q. When was the first time you had any notice from the insurance company that these questions had or denied coverage? A. In the course
55 of a telephone conversation with the Claims Office I had written a letter to the attention of the Vice-President of the organization, Rowe by name, I believe in Chicago, and I was very anxious to get the reply on that, but no reply was forthcoming to me.

Q. Was that the letter dated January 29, 1956? A. I don't recall. I only wrote one demanding letter on that to the Chicago office.

Q. I show you a photostatic copy of a letter which is dated January

29, 1956 and ask you if that is a copy of your signature. A. That is my signature, a copy of my signature.

Q. And is that the letter you refer to which is addressed to the Lumbermens Mutual Casualty Company, attention Mr. Rowe, Vice-President? A. Yes, sir.

Q. Is that the letter you refer to? A. Yes, sir.

Q. That is dated January 29, 1956? A. Yes, sir.

Q. Prior to that time had you not received a letter dated January 16, 1956 signed by A. J. Mayer, Jr., Claims Department? A. I may well have done it.

56 Q. By registered mail? A. It's my recollection that they told me in some communication that I wasn't covered and then I sat down and wrote a letter to the Chicago Office.

Q. But you wrote the letter to the Chicago office although the letter is addressed to 1301 H Street, Northwest, Washington? A. I gave them copies of it.

Q. I mean you sent a copy of it to Chicago? A. No, I sent the original to Chicago as I recall.

Q. And sent a copy to Washington? A. Yes, sir.

Q. And it's addressed attention Mr. Roy C. Rowe, Vice-President? A. He was in their Chicago office as I understand.

Q. Who is the Vice-President of the company in Chicago? A. Yes, sir.

Q. That letter was written as a result of your receiving a letter, receiving a letter dated January 16 in which the company denied coverage? A. You have the facts before you. I don't have that before me. I would assume you are right.

Q. I showed it to you just a minute ago? A. I didn't have an opportunity to read their communication. I received such advice, now
57 whether this was a copy of the advice I received or not, I don't know. I did receive such advice, I know that.

Q. Would you say it was on or about January 17th or 18th.

immediately following January 16th? A. Yes, sir; I would say so because I mentioned in my letter receiving "your letter of January 16th".

Q. Now, did you receive a reply to the letter which you wrote, attention Mr. Rowe, on January 29, 1956? A. They never gave me the courtesy of a reply.

Q. All right, sir. Then what did you do about the matter after January 29, 1956? A. That was the date I wrote the letter to Rowe?

Q. That's correct, sir. A. I called the Claims Office several times about a reply and I never did get a reply in writing. I was told that they had denied any responsibility under it. They said neither I was liable nor were they liable and that, further, I would not get a written reply.

Q. They told you, did they not, that the claim was not covered under your policy? A. They told me that on the 16th.

Q. Yes, sir, and they repeated the information in your subsequent verbal conversation? A. No. They indicated they had disclaimed any
58 responsibility in their communication of the 16th of January. Was that the date?

Q. Yes. A. Yes, the 16th of January.

Q. They just reiterated their former advice to you disclaiming any responsibility under the policy? A. Yes, sir.

Q. Then you knew in January 1956 upon receipt of this letter from Mr. Mayer that the company disclaimed all responsibility under this policy for this claim of Mr. Nicholson? A. Would you repeat the forepart of that question?

(Whereupon, the above-referred to portion of the question was read back by the reporter).

THE WITNESS: I still don't understand your question.

BY MR. BRAULT:

Q. I'll rephrase it, sir. You understood the letter that was written to you by Mr. Mayer dated January 16, 1956 as disclaiming coverage under your policy for any claim which might be asserted for the injuries received by Mr. Nicholson, is that correct? A. Yes, sir.

* * * * *

61 Q. And were you not advised by Mr. Robinson and Mr. Mayer,
or both, that they stood on the disclaimer contained in Mr. Mayer's
62 letter of January 16, 1956? A. That is what I was told after I
didn't receive a reply to my letter of the 29th to Mr. Rowe.

Q. So that would you say, then, that in January and February of
1956 you were aware of the fact that the company disclaimed coverage
in connection with this claim, this accident? A. Yes, sir.

* * * * *

81 EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. LAUGHLIN:

Q. Mr. Finegan, when did you first meet the Defendant John Kroll,
approximately? A. I would say around 1940. You mentioned "meet"
there Mr. Laughlin?

Q. I mean when did you first have contact with him in any way,
whether you met him physically or talked to him? How was it that you
came to contact him and for what purpose? A. I don't know how I met
him for the first time or was advised of it. He wrote insurance for me
in the, I would say the tailend of the '30's, and the early part of the '40's,
and he wrote insurance on my automobile, my household fixtures, fire
and coverage on my house, and then if we had a mortgage there and we
sold the property to someone else I would try to have him write that in-
surance because I found it desirable to center all of my insurance in one
individual.

Q. In other words, you first contacted him at that time for the
purpose of obtaining or inquiring about insurance, is that right, sir?

82 A. That's right.

* * * * *

83 Q. And you looked at Defendant Lumbermens Mutual Casualty
Company's Exhibit No. 1 here which reads, "A farmer's comprehensive
personal liability policy." When did you first, or read, or see the term,
"Farmers comprehensive personal liability policy"? A. When he talked
with me about selling me the policy. That was the first time I have en-
countered the name.

84 Q. Now, Mr. Brault prefaced several questions with the fact that you ordered this policy. Now, was it your purpose in calling Mr. Kroll on the telephone on the date referred to in Mr. Mahoney's questioning to buy a farmer's comprehensive personal liability insurance policy or policies on your farm buildings or other farm insurance? What was the purpose of your call, sir? A. My call was about residence insurance, and in the course of the conversation Mr. Laughlin, he, as I said in my testimony earlier, tried to sell me this policy. It was the first time that I had heard the term.

Q. Now, do you recollect what Mr. Kroll stated or represented to you in this conversation regarding this policy or type of insurance? A. Yes. I put that in the record twice, but I'll repeat it again. As I said, I was unfamiliar with the type of policy that he had in mind and I am unfamiliar with all types of policies, and he mentioned this one and he told me that the other farmers were carrying a policy like that, and he thought I should for full protection. I said, "O-kay, how much will it cost?" And he said, "I don't know how much it will cost, but it won't be much."

* * * * *

88 Q. And you operated two farms at that time, is that right? A. I don't understand your timing.

Q. At the time of the accident? A. I had two farms but I was moving to the second one, and subsequent to the accident I moved my cattle over there because I had feed and easier facilities for feeding my cattle on Reddick Road.

Q. During the period that these policies were in effect what was the largest number of acreage that you had in a farm operation? A. Three hundred and ninety-six (396).

Q. And the principal operation was beef cattle? A. That's right.

Q. You also grew ensilage and fodder, ancillary products that normally go with that type of operation? A. That's right.

Q. Now, in operating a farm of that type is there any period during

the year where more employees are required than at any other period?

A. Yes.

Q. When is that? A. At haying time.

89 Q. Could that in effect be re-informed as harvest time? A. It is harvest time for the hay.

Q. Is it customary, as far as your knowledge goes, to hire additional employees during the haying or harvest time? A. Yes, it is.

Q. While you operated these farms and while these policies were in effect, did you hire additional employees at every harvest time?

A. I hired additional employees on the Hughes Road property at harvest time. I had no harvest as such except my beef on Muddy Branch and I had no reason to hire additional employees there unless I ran into difficulties. Does that answer your question, Mr. Laughlin?

Q. Yes, sir.

Could you state in short detail what your normal operations were? In other words, explain as if to a layman what labor was required in the operation of the farms normally, in short detail? A. I would use the Hughes Road as an example of that, and in that one there was the plowing, the preparation of the soil for the receipt of grains, fertilizing, liming, the cutting, the raking, the plowing, the bailing, taking the hay out of the fields on conveyances and putting them in the barn, watching the cattle that they didn't get diseased, and if they did get worms or needed a veterinarian's care why I would get a veterinarian over and have him
90 look at them or give inoculations, docking, and things of that kind. Ultimately the operation grew into just cattle.

Q. Now, did you apprise Mr. Kroll that you had upwards of 380 or 390 acres of farm and farm operation when you acquired the Hughes Road and the subsequent property which you acquired after owning Hughes Road?

MR. MAHONEY: I object to the question. You mean by "farm operation" that he had that 380 some acres of farming land?

BY MR. LAUGHLIN:

Q. Did Mr. Krolls know that, sir? A. Yes, he knew how much land was included in the two farms because that had to be mentioned in the policy.

Q. Mr. Finegan, you operated these farms as an integrated unit. In other words, what I mean is, you operated the farms as one operation even though they were separate as to location? A. That's right.

Q. And your records are records for all the farms, is that right? A. That's right.

104 FURTHER * EXAMINATION * BY COUNSEL * FOR THE DEFENDANT
105 BY MR. BRAULT:

Q. You said that you did not understand what was meant by farmers comprehensive liability policy when you got that policy from the Mutual Insurance Agency? A. No, his question wasn't that way.

Q. How did you understand his question? A. Have I understood what a farmers liability policy was since I purchased it and my answer to that is I don't know.

Q. At the time you purchased it you didn't know either? A. I was relying on the assurances. I had never heard the term before until Mr. Kroll told me.

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[Filed March 21, 1961]

ORDER

Upon consideration of the motions of defendant, Lumbermens Mutual Casualty Co. to rehear its motion for summary judgment filed herein on the 1st day of February, 1961, and the motion of defendants, Mutual Insurance Agency, Inc. and John H. Kroll to rehear their motions for summary judgment filed herein on the 27th day of January, 1961, and after argument in open Court, it is by the Court this 21st day of March, 1961:

ORDERED, that said motions be and they are hereby denied, and it is further

ORDERED, that the order denying defendants' motions for summary judgment passed herein on the 23rd day of January 1961 be and the same is hereby modified as follows:

That each of said motions for summary judgment filed by the defendants be and the same hereby is denied without prejudice to said defendants to file additional motions for summary judgment.

/s/ Leonard P. Walsh
JUDGE

[Certificate of Service]

[Filed March 29, 1961]

AMENDED ANSWER OF DEFENDANT
LUMBERMENS MUTUAL CASUALTY COMPANY

First Defense

The complaint fails to state a claim against this defendant upon which relief may be granted.

Second Defense

The claim asserted against this defendant accrued more than three years preceding the filing of this complaint and is therefore barred by the Statute of Limitations.

Third Defense

The matters and things set forth in Count One of the complaint, insofar as they pertain to the liability insurance described in the complaint, as to this defendant, were previously adjudicated in the Circuit Court for Montgomery County, Maryland, in Law No. 5982, in which action the plaintiff sued this defendant on November 13, 1956, that a demurrer to the declaration filed therein was sustained by said court on March 13, 1957, with fifteen days' leave to amend, that an amended declaration was subsequently filed as to the medical payments coverage only, and therefore, the claim of the plaintiff on the liability coverage described in said action is res adjudicata.

Fourth Defense

Count I

1. This defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 2.

2. The allegation of Paragraphs 3, 4 and 5 are admitted.

3. This defendant admits that the policy referred to in Paragraph 6 was in effect on the date alleged, that the several paragraphs quoted therein are some of the provisions of said policy, and further avers that the claim of the plaintiff is not covered by the terms of said policy, and in fact is specifically excluded by its terms.

4. Answering Paragraph 7 of the complaint, this defendant admits that at the time and place alleged the plaintiff was engaged in the operation and maintenance of his farm and that John Nicholson was then engaged as an employee of the plaintiff, and while so engaged was injured; that the plaintiff gave notice to this defendant of said accident as alleged; denies that all the conditions of the policy were performed as alleged; admits that this defendant disclaimed coverage and refused to defend, and avers that written notice of said disclaimer was given to the plaintiff in writing on January 16, 1956, by this defendant, setting forth the reasons therefor, and further avers that this defendant was not

obligated to cover or defend said claim, because said claim was in fact excluded by the terms of the policy described in the complaint.

This defendant neither admits nor denies the allegations as to payment of the medical expenses of John Nicholson but demands strict proof thereof, admits that it refused to defend Law Action No. 7546 in the Circuit Court for Montgomery County, Maryland, filed against the plaintiff on behalf of John Nicholson. As to the judgment for \$10,000.00 in said action, this defendant is informed and believes that plaintiff entered into a stipulation in which the parties thereto made certain agreements as to the effect of the judgment entered therein, which was by consent of the parties and not as a result of a trial of the case on its merits and did not establish the liability of the plaintiff to the said Nicholson, and therefore this defendant demands strict proof thereof, and as to any sums which may be due to the said Nicholson by the plaintiff and as to any and all sums which the plaintiff claims to have paid or to have become obligated to pay on account of said loss or accident.

All allegations of said Paragraph 7 not herein specifically admitted are denied.

Count II

1. This defendant adopts by reference and incorporates herein its answers and defenses in Paragraph 1 through 7 of Count 1.

2. This defendant admits that on the date alleged in Paragraph 2 plaintiff and defendant Kroll engaged in a conversation regarding proposed fire insurance coverage on plaintiff's farm properties and admits that defendant Kroll suggested that plaintiff take out a farmer's liability policy; admits that plaintiff purchased a farmer's comprehensive personal liability policy and that the renewal of said policy is the policy described in this complaint; admits that defendant Kroll is a licensed insurance broker and agent and officer of defendant Mutual Insurance Agency; denies that said agency is a general agent for this defendant and avers that it is an agent for this defendant; admits that

plaintiff has done business with these defendants for nearly twenty years or since 1943; and that plaintiff has purchased many other types of insurance policies during said period; avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that said farm liability policies were the first such policies purchased by plaintiff and that the farms insured were the first farms owned or operated by plaintiff; admits that said policies were ordered by telephone between defendant Kroll and plaintiff; denies that plaintiff requested full protection and coverage that would protect him from all liability claims and avers that defendant Kroll and plaintiff discussed "employee" coverage for said policy which was rejected by plaintiff; denies that through error and mutual mistake said defendant Kroll failed to provide "employee" coverage; denies that it was the intent of defendant Kroll and plaintiff to extend "employee" coverage in the operation of plaintiff's farm; avers that said additional premium therefore would be not less than \$23.00; admits that if said coverage was requested by plaintiff and entered in a declaration of the policy for the said premium plaintiff would be protected from the claim of said Nicholson, as alleged; denies the remaining allegations of said paragraph and therefore denies that the plaintiff is entitled to the relief sought.

3. Further answering said Count II of the complaint, this defendant says that the original policy of insurance issued by the defendant to the plaintiff was delivered to him on or about April 3, 1953; that said policy clearly set forth its terms and that, therefore, the plaintiff then knew or should have known that employees were not covered by the terms thereof; that renewal policies were delivered approximately April 3 of each year thereafter, said policies being similar as to their terms and that the plaintiff knew or should have known upon each renewal that said policies did not cover employees; that on or about January 17, 1956 plaintiff received a written letter from this defendant advising him that the defendants disclaimed

coverage as to the claim described in the complaint for the reason that a farm employee is not afforded coverage while engaged in the employment of the insured unless said farm employee is specifically declared in the policy; and that he was then advised that his policy did not so declare his employee; that therefore, the filing of this action for reformation of the policy is barred by laches.

4. Further answering Count II of the complaint this defendant says that by filing the action described in the Third Defense herein the plaintiff elected to stand on the contract as it in fact existed and having so elected is now barred from seeking reformation thereof.

Count III

1. This defendant adopts by reference and incorporates herein its answers and defenses in Paragraph 1 through 7 of Count I.

2. The allegations of Paragraph 2 are denied.

3. The damages alleged to have been sustained by the plaintiff resulted from his own negligence or contributory negligence.

Further answering said complaint and each count thereof, this defendant denies each and every allegation not herein specifically admitted.

BRAULT AND GRAHAM

/s/ Albert E. Brault
Attorney for Defendant
Lumbermens Mutual Casual
Company

* * *

[Certificate of Service]

[Filed July 3, 1962]

PRETRIAL PROCEEDINGS

July 3, 1962

Action for reformation of an insurance policy and damages for breach of contract and negligence.

THE PARTIES AGREE AND STIPULATE TO THE FOLLOWING

STATEMENT OF FACTS: D Lumbermen's Mutual Casualty Co. is a foreign corporation doing business in the District of Columbia and engaged in the insurance business (hereinafter Lumbermens). Defendant John Kroll is a licensed insurance broker and agent and an officer of the defendant, Mutual Insurance Agency, Inc. (Mutual). Mutual is an authorized agent for defendant Lumbermens. Ds Mutual and Kroll wrote a policy of insurance in 1953 in Lumbermen's from April 3, 1953 to April 3, 1954, described as a "Farmer's Comprehensive Personal Liability Policy". Renewals of this policy were issued annually and delivered to the plaintiff. At the time of the incident which is the basis of this action, there was in force and effect Policy No. 5L349,795, copy of which is attached to the complaint, which policy was similar to the original policy issued and was effective from April 3, 1955 to April 3, 1956. Said policies were counter-signed in the state of Maryland and contained the same coverage.

On or about Jan. 2, 1956, one John Nicholson, a farm employee of the plaintiff, was injured as a result of an accident while engaged in working as a farm employee for the plaintiff herein. Subsequently, said accident was reported by the plaintiff to the defendant, Lumbermen's and to the Ds Kroll and Mutual. On Jan. 16, 1956, D Lumbermen's wrote a letter to the plaintiff forwarded by registered mail, disclaiming coverage and advising the P that the reason for the disclaimer was that a farm employee is not afforded coverage while engaged in the employment of the insured, unless said farm employee is specifically declared in the policy and that in this instance, the employee, is not declared. Said letter was received by the plaintiff. Nicholson filed, thru his father and next friend, a liability & torts suit in Circuit Court,

Montgomery County, Md., against the plaintiff, on or about March 17, 1958, which suit the D Lumbermen's refused to defend, and which suit resulted in a judgment against the P in the sum of \$10,000 in favor of Nicholson. Said judgment was entered by consent by the parties in said action.

PLAINTIFF CLAIMS that on or about April 3, 1953, he operated 2 farms in Montgomery County, Maryland, and in a telephone conversation with D Kroll regarding fire insurance on his farm buildings, Kroll suggested and recommended that P should have a "Farmer's Liability Policy" to protect him from liability claims in the operation of his farms, as a result of which the P purchased the policy issued in April, 1953, and the renewals thereof, including Policy No. 5L349,795. P claims these policies were issued in Washington, D.C.; asserts that Kroll represented that P would receive "full liability protection in the operation of your farms", that P dealt with Kroll in good faith and confidence, relying on his skill, judgment and counsel, based upon 20 years prior dealing between them and particularly relied on Kroll's specialized knowledge as insurance broker; that at all material times Kroll was the president of Mutual; that in reporting the accident to Lumbermen's, P furnished all proofs of loss, and other conditions of the policy were complied with; that Lumbermen's refused to investigate, settle, defend, or otherwise protect the P; that all of the Ds disclaimed coverage forcing P to investigate, defend and settle the claim of Nicholson himself, including the hiring of attorneys and the payment, in an attempt to mitigate liability and damages, of medical bills of Nicholson in the sum of \$1,236.51; that Lumbermen's refused to pay the sum of \$250 medical payment coverage under its policy; at all times mentioned P dealt with Ds in good faith as evidenced by 20 years prior dealing among them, and policy issued by D Lumbermen's was in the belief and understanding of P and D Kroll adequate and full protection against such a claim as was asserted against P by Nicholson.

Further asserts that the Ds, and each of them, were negligent in not ascertaining the extent of P's farm operation and the number of full or part-time employees used by him and in not making an inspection or audit of the farm's or of the policy, that the insurance company did waive and is estopped from a defense that the farm operation or number of employees were not specified in the face of the policy herein and Lumbermen's breached the contract of insurance in not defending and adjusting the claim against the plaintiff; that Lumbermen's failed to use its right of inspection or audit at any time during the policy period at or any time within 3 years after expiration thereof.

CAUSES OF ACTION Three; breach of contract, reformation and negligence, against each and every D. The P sues the D Ins. Co. as the promissor on the contract of insurance and as principal of the other Ds. He sues the D Mutual Ins. Agency as agent of the D Ins. Co. and as the principal and employer of the D Kroll; he sues D Kroll as broker, agent and officer of the D agency and as agent of the D Ins. Co. and individually. The P alleges the following acts:

1. That the D Ins. Co. wrongfully refused to defend, adjust and settle the claim of Nicholson against the P.

2. That the D Ins. Co. wrongfully refused to extend liability coverage to the P as stated in the policy.

3. That the D Kroll negligently while acting individually and as agent and/or officer of the D Agency and as agent for the D Ins. Co. wrote and issued the policy of insurance; that said Kroll did not as a broker and salesman inquire into the extent of coverage required by the P; that the said Kroll knew or should have known that the P as the owner and operator of a 396 acre farm would from time to time have employees, that the course of conduct of said Kroll caused the P to rely on the skill and experience of said broker and believe that he had full farm liability coverage as represented to him at the time of purchase.

4. That by mutual mistake of fact and error of the P and the D Kroll as agent, and/or officer of the other Ds and individually, the employee coverage was not declared on the policy issued to the P.

DAMAGES CLAIMED BY PLAINTIFF

1. Cost of liability judgment against Plaintiff by Nicholson	\$10,000.00
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2. Medical bills paid by P on behalf of the injured Nicholson in an effort to mitigate his liability.	1,236.51
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3. Attorney's fees paid to counsel by P to defend the Nicholson claim.	875.00
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4. Coverage B, medical coverage	250.00
Plaintiff claims interest from Jan. 6, 1956 plus cost on all items.	

DEFENDANT LUMBERMEN'S denies that Mutual or Kroll is the general agent of Lumbermen's but admits that Mutual is its authorized agent; asserts that all of the policies in question were issued in the State of Maryland and they are governed by Maryland law; that the policy as issued, names the P as the insured and covers premises which were designated in Item 1 thereof as R.F.D. No. 3, Gaithersburg, Montgomery County, Maryland. Total acreage as designated in Item 4 is 35; that Item 3 of said policy provides that the insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The premium charges indicated on said policy are \$14.40 for liability coverage with a limit of liability for each occurrence of \$25,000.00 and medical payment coverage with a limit of liability of \$250 for each person; that the policy declaration does not provide for any other insurance coverage other than the above stated liability and medical payment coverage; that said policy contains certain exclusions, among them being Paragraph No. (d) which provides in substance that the policy does not apply under coverages A and B for bodily injury, sickness, disease, or death of any farm employee while engaged in the employment

of the insured unless farm employees are specifically declared in the policy.

That in its letter of Jan. 16, 1956, to the P, it advised the P that it did not waive any other defenses it might have under its policy.

That on to wit Nov. 12, 1956 the P sued this D in the Circuit Court for Montgomery County, Maryland in which action he claimed the benefits of the above described insurance policy on account of the injury to the said John Nicholson both for liability and medical payment. Demurrer was filed to said declaration by the D and was argued and sustained by said Court. Thereafter an amended declaration was filed claiming only \$250 due under the medical payment coverage of said policy and on Jan. 13, 1960 said action was dismissed without prejudice by the P. This D admits that the P was sued by the said John Nicholson in the Circuit Court for Montgomery County, Maryland on or about March 17, 1958, that this D refused to defend said action for the reason that said claim was not covered under the aforesaid policy of insurance and that the D refused to pay any amount claimed in said action. Subsequently, P entered into a voluntary settlement with the said John Nicholson and consented to a judgment being entered against him in the sum of \$10,000.00.

Denies it is indebted to the plaintiff in the amount claimed or for any other sum because the claim of John Nicholson is not covered under the terms of the policy issued and in fact such claim is specifically excluded therefrom; relies on the defenses of res judicata and the statute of limitations; denies that P was obligated to pay to John Nicholson the sum of \$10,000 or to consent to a judgment for such an amount and therefore if it should be found to be liable to the P under the terms of said policy, D demands strict proof of all sums paid or agreed to be paid by the P and the value of said claim.

Denies that Mutual is a general agent of this D and denies that the failure to provide "employee" coverage was thru error and mutual mistake and that the policy delivered to the P on April 3, 1953, and all

renewals thereof, clearly set forth the policy terms and that P either knew or should have known, employees were not covered thereby.

This D relies on the defense of laches as to reformation since the P was given notice on or about Jan. 17, 1956 by registered mail that the D deny coverage and the reasons for the denial; that by filing an action against Lumbermen's as described hereinabove in the Circuit Ct. of Mont. City. Md., P elected to stand on the contract as it in fact existed and having so elected, is now barred from seeking reformation.

As to the claims of this D's negligence, it denies any negligence and adopts all the defenses previously stated hereinabove and relies on contributory negligence of the P in that he knew or should have known the terms of the policy when it was first issued to him in 1953 and as to the renewals thereof; that he was negligent in failing to read the policies and in failing to read those portions thereof which would disclose the coverage and the exclusions therein; denies P filed proof of loss or complied with all other provisions of the policy.

This D asserts that in the conversations between D Kroll and P which are alleged by the P as leading to the issuance of the policy, Kroll was acting as an insurance broker and not as agent for Lumbermen's.

This D, therefore denies any responsibility to the P, and denies his right to reformation of the contract.

DEFENDANTS MUTUAL AND KROLL admit that Kroll was president of Mutual at all times relevant herein; assert that following the letter of Jan. 16, 1956, forwarded by Lumbermen's and received by P, wherein Lumbermen's disclaimed coverage as stated herein, there was no subsequent correspondence or communication between the P and these Ds which in any way modified altered or changed the insurance company's (Lumbermen's) position with respect to its disclaimer of coverage. Furthermore, no suit or other proceeding was instituted against Mutual Insurance Agency, Inc. or John H. Kroll involving the

policy of insurance attached to the complaint prior to the filing of the action herein of Jan. 12, 1960.

The claims asserted against Ds Mutual and John H. Kroll are barred by the statute of limitations because if these Ds breached any duty owed P, such breach occurred at the time of the issuance of the policy, or at the time the claim was presented, both of which instances occurred more than 3 years prior to the institution of this suit.

These Ds aver that said policy of insurance, hereinabove referred to was the policy requested by said P to be issued through these Ds. These Ds therefore deny that "employee" coverage to be included as part of the insuring provisions of said policy was requested. D Kroll believes that he advised Finegan of the cost of employee coverage but that Finegan did not want to purchase it on account of the expense involved and for the further reason that Finegan was going to sell the property within a comparatively short period of time. These Ds therefore deny any responsibility to the P and right of reformation of the policy.

PLAINTIFF ASSERTS THAT all actions filed in the Circuit Court of Montgomery County, Maryland by P were dismissed without prejudice as the court determined they were premature; that no action could arise until the liability against the P was determined.

STIPULATIONS

The policies of insurance, initialled by Examiner, and the copy attached to the complaint, may be admitted in evidence.

The following may be admitted without formal proof, subject to all proper legal objections: P-1, initialled by Examiner;

Counsel for the P requests that Ds make the following stipulation: (1) that the Ds or any of them did or did not avail themselves of the policy provision regarding the inspection of the farm operation, the farm payroll or policy audit at any time; (2) that the insurance contract

(policy) was issued pursuant to a phone conversation, and that the policy first issued on the farm was suggested to the P by the L Kroll;
(3) that the D Lumbermens Ins. Co. knew at the time of the judgment against the P in favor of Nicholson, the amount of said judgment;
(4) that the amount of \$875.00 paid to Joseph Simpson, Esq. of Rockville, Maryland was a fair and reasonable amount for fee as attorney for the P in defending him against the claim of Nicholson. Ds refuse to so stipulate.

The D Lumbermen's request the P to stipulate to the following:
(1) that a photostatic copy of a letter addressed to the P by this D dated January 16, 1956 be admitted in evidence without formal proof and that the P admit that said letter was received by him on January 18, 1956, copy of which is initialled by Examiner; (2) that certified copies initialled by Examiner of pleadings and docket entries in Law No. 5982 filed in the Circuit Court for Montgomery County, Maryland be admitted without formal proof; (3) that this D may offer in evidence, subject to objection as to competency and relevancy certified copies, initialled by Examiner, of pleadings, stipulations and docket entries in Law. No. 7546 filed in the Circuit Court for Montgomery County, Maryland. P refuses to so stipulate.

D Lumbermen's requests that P produce at trial his books and records maintained by him in the operation of the farms covered by the insurance policies issued by this D from 1953 thru 1956 which will disclose the identity and number of employees on said farms and that said records may be introduced in evidence without formal approval. P refuses to so stipulate.

The parties agree to file with the Clerk of the Court and to the mutual exchange of, on or before Sept. 14, 1962, a list of the name(s) and address(es) of witnesses to be used at the trial.

The parties shall file with the Clerk of the Court, a brief, pursuant to Section II-F of the Pretrial Instructions to Counsel, furnishing opposing counsel with a copy thereof, on or before Sept. 14, 1962.

TRIAL COUNSEL: Thomas G. Laughlin, Esq. for the Plaintiff;
Albert E. Brault, Esq. for Lumbermen's; John F. Mahoney, Jr., Esq.
for Kroll and Mutual.

/s/ Thomas G. Laughlin	Counsel for Plaintiff
/s/ Albert E. Brault	Counsel for Lumbermen's
/s/ John Mahoney	Counsel for Kroll and Mutual
	/s/ John J. Finn
	PRETRIAL EXAMINER

TRANSCRIPT OF PROCEEDINGS

1

Washington, D.C.
Wednesday, January 23, 1963

The above-entitled cause came on for trial before the
HONORABLE EDWARD M. CURRAN, a U.S. District Judge, at 2:20 p.m.

* * * * *

OPENING STATEMENT BY COUNSEL FOR THE PLAINTIFF

MR. LAUGHLIN: May it please the Court, ladies and gentlemen,
by name is Thomas Laughlin. I represent the plaintiff in this case,
Mr. Paul V. Finegan.

Now, I will show by the evidence, the testimony of Mr. Finegan and others, that Mr. Finegan, in the early part of 1953, was working in the government, and around February or March of that year he bought two farms in Upper Montgomery County, Maryland, that those farms constituted approximately 397 - 98 acres. That either at the time of the settlement of those farms, or within a day or two of that period, Mr. Finegan contacted the defendant, John Kroll, who you see

sitting at the far end of the counsel table for the defendant, because Mr. Kroll was an insurance broker and general policy agent for Lumbermens Mutual Casualty Company, and also an agent and officer of the defendant, Mutual Insurance Company.

He contacted them relative to the purpose of having all of the buildings on his two farms properly protected by fire and extended coverage insurance.

2 I forgot to mention that I will show that Mr. Finegan had never owned a farm before. Actually, when he was five years old he did one year live on a farm. These two farms he purchased were the first farms he ever owned.

By the way, it will be brought out, and I will admit, that Mr. Finegan has a fairly high job in the government, and that he also possesses a law degree, but that he has never practiced law. He has always been in the government, but he has never practiced law.

I will show that these farms were the first that he bought. Almost as soon as he bought them, if not almost simultaneous with settlement, he did contact Mr. Kroll, who is his insurance agent. And I will show that from the year -- the month of March 1939 up until the time that he ordered these fire insurance policies, that Mr. Kroll was Mr. Finegan's insurance agent and confidant.

That through those twenty some years, or approximately twenty years, of dealing between the two parties as customer and insurance broker, that Mr. Finegan reposed absolute confidence in the judgment and advice of Mr. Kroll. That that confidence and advice was based upon the long period of dealing, and that he had purchased in that period of time many policies of insurance.

3 I will show that over 37 policies of insurance were purchased from Mr. Kroll in that period of time.

I will show that relative to the placement of the fire and extended coverage insurance on the farm buildings was brought up and suggested by Mr. Kroll that, "If you are going to operate a farm, you should have

farm liability insurance, specifically, comprehensive farm liability insurance to protect you in the operation of the farm. Every farmer has it, and you should have it because you operate a farm." I said, "operate," not "lease" a farm; "operate" a farm.

I will show that Mr. Finegan stated he wasn't familiar with that, didn't know what it was. That the inquiry made by Mr. Kroll was very limited, having to do with the size of the farm and the location of it. But I will show you the inquiry regarding the fire extended coverage insurance was more broad, having to do with where the nearest water was, construction of buildings, and so on. That the policy of farm liability insurance was not inquired into in proper detail.

Now, I will show that Mr. Finegan reposed so much confidence in Mr. Kroll, and Mr. Kroll in Mr. Finegan, that these 37 - 38 policies

4 he purchased in the long period of time were all done by telephone -- telephone.

I will show, relative to this telephone conversation which I stated, that later a farmer's comprehensive personal liability policy was sent to him by Mr. Kroll, which was written as an agent and officer of the Mutual Insurance Agency, and with their authority, and with the authority and as an agent for Lumbermens Mutual Casualty Company.

The policy was sent to him. Mr. Finegan looked at the policy, examined it, but not in detail. He put it among his other farm records.

I will show you that at the same time the premium on the policy is nominal. At the same time the premium on the fire insurance extended coverage was approximately \$464.

I will show that the placement of the liability insurance was only one of many things -- only one of many things that Mr. Finegan did in acquiring this farm and in attempting to properly protect himself; that the premium was not discussed.

Now, I will show that Mr. Finegan, in the operation of these farms -- subsequently he got another farm which was insured -- he sold one of his first two farms and acquired another one.

5 I will show that the farm operation which for these three years, which I will discuss later, was a very large operation. The farm had several hundred acres crops, over a hundred acres of pasture, up to 85 or 88 cattle, that he had tenant farmers on his farm at all times, that he lived on the farm, and that the family lived on the farm, and the farm operation was a typical -- more or less typical farm operation for that area in Montgomery County, Maryland.

I will show you that Mr. Finegan, who at all times, even while he was farming, was still working in the government, as he does now, but he was operating this farm during the three year period.

I will show you that in addition to the tenant farmers, who always resided on the farm, that he had other workers and, at times, he had as many as 13, 14 or 15 workers working on his farm, particularly around harvest time or at a time the cattle had to be processed for some reason or the other.

Now, I will show you that Mr. Finegan was sent a renewal of that policy -- a renewal was sent to him. The policy was the same as the first. But when he sold one of the first two farms he did call that to the

6 attention of the insurance company. He properly notified them of the change of one of the farms and the acquisition of another. At all times they were apprised of where the farms were and what kind of operation it was.

I will show you that when the second policy expired, then a third policy of the farmer's comprehensive farm liability insurance was issued to Mr. Finegan.

By the way, I will show that at all times there was never any question regarding payments of premiums, or anything. Mr. Finegan always paid his premiums no matter what they were, did so promptly during that whole period of time. No difficulty at all regarding even the price of the premium, or anything else. That he had full confidence in Mr. Kroll. When Mr. Kroll sent him something, he took it in good faith, and Mr. Kroll's word, based upon Mr. Kroll's over 20-25 years experience as a specialized insurance agent.

Now, I will show you that after this third policy of insurance was in effect, to be specific, January 2nd, 1956, and during the maintenance and operation of the farm there was a farm vehicle, not to be used on public roads, which was being towed by a tractor from one part of the farm to another. That operating the tractor was one John Nicholson,

7 a lad of 19 years of age, who had worked for Mr. Finegan on the farm for over two years. Nicholson is a school boy, but he worked on the farm as many boys do.

That during the course of this farm operation, towing this other vehicle by cable, that Mr. Finegan was operating this other vehicle, and that the tractor was drawn, was being operated by this young 19 year old lad who has worked for him for over two years, that an accident occurred. That they went up over a little hill and the vehicle which was being towed slid down the downgrade and headed right for the tractor, that they were towing by cable instead of a chain -- it could have been -- that this vehicle had no brakes on it at all, that the vehicle crashed into the tractor, knocked it over, knocked the farm worker off the tractor, and the tractor fell right on the left tibia and fibia of the farm worker, and shattered his leg.

Now, I will show you, ladies and gentlemen, Mr. Finegan did everything he could instantly to help that young lad. Rushed him to the hospital and entered him into the hospital, Suburban Hospital, in Bethesda. That immediately because the lad had no money, he advanced some money and then immediately called Mr. Kroll, his insurance

8 confidant, his agent for that many years, and reported the accident.

Mr. Kroll took note of it, thanked him for reporting it, and said they would send an adjuster out. That the insurance company did, in fact, send an adjuster out within a day or two, took statements from Mr. Finegan and, in the hospital, took statements from the poor lad, the farm worker. I will show several other compensations from Mr. Kroll, primarily, and others in the insurance company; that Mr. Finegan was quite satisfied, he was protected as was warranted.

I will also show that during that initial phone conversation regarding these policies that Mr. Kroll said he would be fully protected in the operation of his farm, as a farmer should be, and as other farmers are. But, notwithstanding that, I will show that approximately three weeks -- to be specific, 17 days after the accident that Mr. Finegan got an official letter from the claims manager, Mr. Mayer, of the Lumbermens Mutual Casualty Company in this area, that they are very sorry, that he was not covered by the insurance because the farm employee was not specifically set out and named in the schedule of other servants, as listed on the policy and that, therefore, because of the exclusion on the back of the insurance policy, Exclusion Number

9 A-C-1, that he didn't specifically name him in the policy and, therefore, they could not protect him. They gave as a reason that if he wasn't named in the policy they were not paid for that exposure to liability or risk and, therefore, could not help Mr. Finegan.

Mr. Finegan pleaded with them many times and did everything he could in his power and persuasion, and even used his extremely limited knowledge of the law. He sent them a letter trying every way to induce them to not only protect himself, but to protect the poor lad who was permanently injured.

Now, I will show that when the insurance company was resolute that they were not going to pay this claim, that they became resolute, not at the time of the accident, but when they investigated eighteen days later; that when he knew that he then took upon himself and did what he could for the boy; that he paid an \$860 hospital bill from Suburban Hospital for the treatment of the boy; he paid an orthopedic surgeon's bill of \$300; a physical therapist's bill of \$40; and even advanced the lad some money.

10 Notwithstanding that, and because of the extremely serious injury to the lad, the lad, through his father -- he being a minor -- did later, approximately a year later, filed suit against Mr. Finegan alleging negligence, and this suit was for ninety thousand dollars; that

Mr. Finegan immediately took the suit papers again to the agent of the Lumbermens Mutual Casualty Company, and Mutual Insurance Agency, Mr. Kroll, and that they, again, were resolute that they were not going to do anything for him.

The end result of the suit, ladies and gentlemen, was a judgment entered against Mr. Finegan for ten thousand dollars; that Mr. Finegan, in order to protect himself, had to hire the services of an attorney, Joseph Simpson in Rockville, and that he had to pay Mr. Simpson \$778 and other various costs in this suit against Mr. Finegan; that he did pay the ten thousand dollars -- it took him approximately a year -- he had to pay it bit by bit -- he paid it in full. And the judgment against Mr. Finegan was very reasonable under the circumstances in the light of the serious injury to the young farmer, and it was a permanent injury; that, in fact, I will show not only that Mr. Finegan was in the farm operation and was actually liable for this accident, but the injuries are permanent and the young lad is still using crutches.

- 11 Now, I will show, ladies and gentlemen, that this policy is a specialized type of policy, completely and thoroughly distinct from an automobile policy. Generally, most people, when they think of insurance, think of automobile insurance because this is probably the most popular type.

I will show that this is as distinct from an ordinary automobile policy, or other type of policy, as any policy can be.

For instance, I will show, ladies and gentlemen, that it is not a farmer's liability policy or a personal liability policy, but it is a farmer's comprehensive liability policy; that the policy is most technical, and that the various exposures and risks on a farm are many, and, in fact, that a farm is a very dangerous place.

I will show that this policy agrees, under Coverage A, to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness, or disease, and including death at any time resulting therefrom, sustained

by any person, and as damages because of injury to or destruction of property, including the loss of use thereof.

12 Now, I will show that the policy, on its face, shows that the coverage is twenty-five thousand dollars, and I will show that the declarations, or what is set out in the policy, has spaces for medical payment, for general liability, for animal collision; farms -- all employees on farms other than inservants, on inservants, on occasional inservants, on full time resident employees, additional farm premises -- that sets out the acreage.

The policy also sets out the number of full time residence employees of the named insured or spouse, and that it sets out all other insured who are residents of the named insured's household.

Now, ladies and gentlemen, I will show that this policy is the type of policy which is not conclusive as to coverage or premium until the policy is over with, or until three years after the expiration of the policy, because, I will show, ladies and gentlemen, that by custom and usage, and also of necessity, that a farmer cannot determine the amount of employees he is going to have in a year; that he may have no employees other than his family one portion of the year, and that at the end of that year, particularly at harvest time, he may have a dozen or a half dozen, or if he does fence work or other normal farm work, he may have many workers.

13 I will show, ladies and gentlemen, that the policy is not vague as to that fact. The condition in the policy says that the company shall be permitted to inspect the insured's premises and the insured's farm operation, to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of this policy, as far as they relate to the premium bases or the subject matter of the insurance.

I will show you, ladies and gentlemen, that custom and usage in placing a comprehensive farm liability policy is to audit the farm operation, inspect the farm operation, determine the exposure to

liability, to determine the number of workers, if any, and to physically inspect the farm; particularly if it is a policy written for the first time.

I will show that it is practice that an application be sent and filled out regarding the various hazards, that is, the various risks, in an operation of a farm, particularly a large one, very large farm, and that that way, then if it is done in that custom and usage -- and I am talking about custom and usage in Montgomery County, not Washington, D.C., because there are not very many farms around here -- that that custom and usage is done in this method -- this method of proper investigation

14 and determination -- is done, not for the protection of the insured, but for the protection of the insurance company; that if they know the type of farm operation then they can properly insure against it.

I will show, ladies and gentlemen, that this custom and usage was not followed, and I will show, ladies and gentlemen, that Mr. Kroll, despite his many years in the insurance business, did not follow that custom and procedure.

Now, I will show that Mr. Kroll is not licensed to do business in the State of Maryland, although this is a Maryland policy, but I will show, also, the policy was properly countersigned in Maryland.

I will show that Mr. Kroll does not write any farm policies at all because in Washington, D.C., he being only licensed in this city, does not have occasion to write farm policies; he does other agency work.

I will also show that at all times Mr. Kroll in all of his contacts, that is, contacts with Mr. Finegan, were business contacts; they weren't social, but business. And at all times he was doing business with Mr. Finegan he had full authority, not only binding authority, express and implied authority, to deal with him and to guarantee

15 coverage or to make representations and warranties to Mr. Finegan.

In fact, I will show you that he is the President of the Mutual Insurance Agency and that he has binding authority, authority to write on his own word, his own say so, up to three hundred thousand dollars worth of comprehensive insurance; that the Lumbermens Insurance Company trust him.

I will show that the Mutual Insurance Company is a proper agent of the Lumbermens Mutual Casualty Company and that Mr. Kroll is an agent and officer of the Mutual Insurance Company.

Ladies and gentlemen, I will show you also that even if this policy does not set out on the face of it the number of employees, that he still is covered by the policy of insurance because not only the custom and usage, but also because of the exclusions. What they allege was not covered because of these exclusions are not set out in the policy with any prominence or with any notice to the insured.

And I will show you also, ladies and gentlemen, that even if it be determined that coverage is lacking, that it was the intent and understanding of the parties to the policy that Mr. Finegan was going to be protected in such a manner by the Lumbermens Insurance Company.

16 I will show you that he didn't read the policy in detail, that it wasn't necessary for him to read the policy because of the good faith and confidence and reliance he had in Mr. Kroll as evidenced by the twenty years of prior dealings and good faith in him, and based upon Mr. Kroll's superior knowledge.

Now, I will show also that even Mr. Kroll thought for a time that even if it was not specifically set out that the gentleman was covered under that contingency.

It wasn't until the claims office and the home office --

THE COURT: Speak up. The reporter cannot hear you.

MR. LAUGHLIN: -- asserted a technicality that he was not so covered and not protected.

I will show you, ladies and gentlemen, that during the whole three years this policy was in effect, although the provision was in the policy for the benefit of the insurance company to go out and inspect this farm, count his cattle, his acreage, and, above all, to determine the number of employees he had -- he at all times had records, farm books that had those things in it -- Mr. Finegan at all times dealt in good
17 faith and never concealed anything from the insurance company, never.

I will show that Mr. Kroll, although he represented -- he was a broker at the time, also agent to Mr. Finegan -- that he then, through weighing of pressures decided that he would then switch his allegiance to Lumbermens Insurance Company rather than to his own customer.

I will show that Lumbermens has had a vested interest in the Mutual Insurance Company, more than just an agency. And I will show that many pressures were put to bear upon Mr. Kroll.

Now, I will show that Mr. Kroll himself, and as agent for Mutual, is a licensed duly authorized agent for Lumbermens Insurance Company, was negligent, not only in properly inspecting the farm, the farm operation, failure to use the application properly, and that his negligence resulted in the losses accrued as I stated.

I will show that Mr. Finegan was so damaged, not only by the hospital bills that he paid, but by the judgment that he paid, \$13,886.

I will show you that Mr. Kroll was negligent, either out of ignorance or out of his own custom, the way he operated, and the
18 Lumbermens themselves were negligent in not properly determining the operation of the farm.

I will also show that Mr. Finegan at all times in all of his dealings with Mr. Kroll was a very responsible party and always insurance conscious. In fact, he was so conscious of insurance he had to call them from the lawyer's office when he settled the farm.

I will admit that Mr. Finegan is not an experienced farmer; that he did operate the farm. And as far as his insurance protection, he relied on Mr. Kroll.

I will show that Mr. Kroll, by failing to properly ascertain the risk and coverage sent insufficient information to Lumbermens Casualty Company and that this policy was issued.

Even so, even as the policy was issued, even as it is written now, I will show that an interpretation of the policy shows that he may be covered because the employees cannot be ascertained until the policy is over with; then only then can the premium be properly assessed through audit and inspection. Analogous, perhaps, to a restaurant having so many employees over a period of a year -- maybe five employees at one time, and at the end of the year they might have had twenty-five employees. They are picked up at the end of the year, not

19 as each new employee comes.

There was never any obligation upon Mr. Finegan to specifically name all of his employees -- Harry Jackson, or Hank Forrest, or John Nicholson -- for if the insurance company or the agent had properly taken advantage of the policy, that information was there.

I submit, ladies and gentlemen, that when we adduce all of this evidence, that you look at it impartially, you look at the policy, even as it is, or the conduct of Mr. Kroll who is authorized to act for the other parties, that you will find not only that Mr. Kroll was negligent, that that negligence led to the loss to Mr. Finegan, but also that the company itself was negligent, and they waived a right. And, also, the policy is capable of being interpreted to cover the loss, even as it is, although it is not particularly clear.

I will show that Mr. Finegan, although he saw that he had farmer's comprehensive liability insurance, felt protected, and that he, even during the renewals, felt and knew that he was protected by the conduct of these other parties.

20 I submit, ladies and gentlemen, when these facts are proven that you will weigh them impartially together with all others, that you will return a verdict for all of the damages that Mr. Finegan will prove.

Thank you very much.

MR. BRAULT: May we approach the bench, Your Honor?

(AT THE BENCH:)

MR. BRAULT: If Your Honor please, at this time we would like to renew our motion for summary judgment which was previously made in this case, and also move for a directed verdict in favor of the defendant, Lumbermens Mutual Casualty Company, as to all three counts of the complaint, and we would like to have the opportunity of arguing the matter to the Court outside the presence of the jury.

THE COURT: Do you mind doing it in the morning?

MR. BRAULT: No, sir.

THE COURT: I have an appointment, as I told you.

MR. MAHONEY: I have the same motion for summary judgment and directed verdict.

(Thereupon, at 3:21 p.m., the above proceedings were respited until Thursday, 11:00 a.m., January 24, 1963.)

[Jan. 29, 1963]

**MEMORANDUM IN OPPOSITION TO DEFENDANTS' THIRD
MOTION FOR SUMMARY JUDGMENT ETC.**

The plaintiff does not deny that the limitation in which he may bring his legal actions is three years, nor does he deny the following important dates relevant here:

(a) The similar policies of insurance were to be for the period of April 3, 1963 to April 3, 1956.

(b) That a farm employee was negligently injured in the operation of the farms by the plaintiff on January 2, 1956.

(c) That the defendant insurance company disclaimed or denied coverage to the plaintiff Finegan on January 18, 1956.

(d) That the injured farm worker sued the plaintiff herein on March 17, 1958 in the Cir. Ct. for Mont. Cty. Md.

(e) That a judgment for \$10,000.00 was entered against the plaintiff by and in favor of the farm worker on May 5, 1959.

(f) That the said judgment was paid by the plaintiff herein on December 22, 1959 in action No. 7546 of Cir. Ct. Mont. Cty. Md.

(g) That this action was filed against the insurance company and their authorized agents on January 12, 1960.

**1. THE STATUTE OF LIMITATIONS HAS NOT TOLLED AND THE
DOCTRINE OF LACHES DOES NOT PRECLUDE THIS ACTION.**

The only question to be resolved is: How is the limitation to be computed? From the time of disclaimer? From the time of the farm worker's injury? From the liability of the insured? The answer is easy if the type of policy is correctly determined. This is a suit based upon a Farmers Comprehensive Personal Liability Policy where the company is, "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of etc. (insuring agreement 1 Cov. A). There is no agreement or obligation of the insurer to indemnify the insured until the insured is to become "legally obligated

to pay damages to a third party. This is clear. This is a contract to indemnify against liability but only when the liability is established.

In Northwest Airlines v. Glenn Martin Co. 161 F Supp. 452 which was an action by an airline suing the manufacturer of one of its planes which crashed and killed all passengers and crew in negligence and warranty. Here defendant's Motion for Summary Judgment was denied when it interposed a defense of limitation of action because it was bought 9 years after delivery of the plane to the plaintiff and 8 1/2 years after the fatal crash. Plaintiff paid all the tort claims against it and then sought contribution. Judge Dorsey Watkins held that if the action were brought within three years of the settlement of the first tort action against the airline, then the action before it was in proper time.

In Tubize Chatillon Co. v. White Trans. Co. 11 F Supp. 91 J. Chesnut (Md.) defines in detail on pg. 96 the types of insurance actions and when the computation of time is to be started. This case sets out the distinction among the various types of insurance contracts. It is there correctly states that a policy to protect an insured against loss by liability does not give rise to an action by the insured until his liability is determined by judgment or settlement. Other policy actions, as cited by the defendants here, on fire, accident, non third party risk, life insurance and casualty policies are quite different because in each of them the rights and liabilities of the parties can be determined at the time of the fire, death, property loss etc. Although the contract may have been breached at the time of disclaimer or the result of the negligence then discovered, no loss occurred until the judgment was paid.

In Hanna v. Fletcher 97 U.S. App. D.C. 310, 58 ALR 2d 847 231 F. 2d 469.

where the negligence occurred 8 years before the injury, the action did not accrue until the injury resulted from the negligence. Judge Fahy went further to state that," Even if the tenant's action against the landlord was deemed one for breach of contract, the cause of action would not accrue until the date of injury and not the date of defective repair."

See also Gortman v. St. Paul Insur. Co 121 A 2d 812 (Md.)

2. The doctrine of laches is not applicable here. The basic elements of laches are, (A.) Lack of diligence on part of petitioner and (B.) Hardship because of delay to the respondent. The action in the Montgomery County Court was filed after the suit by the farm worker against Finigan. It was dismissed because it was premature, the reason was that then the plaintiff's damage was not affixed. The plaintiff was then "too diligent". There was no hardship to the insurer because it fought to have the action then dismissed and its attorney was Mr. Brault who then argued the same cases that I am now using. The elements of laches are too well known to require citations.

3. It is apparent that the defendants' want to construe the policy strictly and against the insured until it comes to Condition No. 9, the 'no action clause. This makes it a condition precedent before any action, legal or equitable, can be made against the insurer that the insured obligation to pay shall have been finally determined by judgment etc. See also Brotherhood of Loc. Fireman v. Mitchell 190 2 2d 308 and Vol. 42 Cor. Juris Sec. sec. 14 b, pg. 580.

4. ALL THE PLAINTIFF'S ASSERTED REMEDIES ARE PROPER.

The defendants here are asserting that the authorized agents who bind the insurance company may be liable for mistake or negligence but may not bind the company. All acts alleged have to do with insurance. In Maryland as elsewhere the mistake of the broker in placing will bind the company if he has the authority. The allegations are broad and cover the issues of breach of contract, breach of contract as reformed and negligence. Reformation always imputes negligence. An agent with authority who makes incomplete statements to his company in an application of insurance, binds his company as to the insufficiency and the company is estopped from asserting agent's negligence

Great Eastern Casualty Co. v. Schwartz (Md.) 122 A 647, 143 Md.
452 2d

In Maryland an insurance policy will be construed against the party drawing it and any meaning favorable to the insured in interpreting a clause will be made if reasonable. In Maryland the an insurance policy must be construed as a whole, and if the insurer is to limit coverage, he must do so in a manner to make clear the exclusions. Haynes v. Amer.

Cas. Co. 179 A2d 900 228 Md. 394 Pa. Threshermens Ins. Co. v.

Shiver 168 A 2d 525 West Law Ency. for Md. Vol. 12, Ins. sec. 74.

In Bauman v. Royal Indem. Co. 174 A 2d N.J. 1961, pg. 589 which is cited by Mr. Brault and in which case reformation was allowed, the court stated:

"the insurance company designated its policy as a comprehensive personal liability policy and sold it to the policy holder as such. The designation was a very broad one and while the company had the right to exclude particular types of personal liability from the so-called comprehensive coverage, its responsibility was to do so unequivocally. c.f. Mohawk Valley Fuel Co. v. Home Indem. Co. 165 N.Y.S. 2d 357, 363. In all fairness to the ordinary layman who is the average insured, an exclusion clause should be so prominently placed and so clearly phrased that 'he who runs can read'."

In Employers Liability Assoc. v. Reed's Refrig. Co. 158 A 2d 616, 220 Md. 49, 1960 the Md. Court of Appeals held that a party having a Comprehensive Dishonesty Policy was covered for a loss by an employee which occurred outside of scope of employment even though the employee was not specifically declared on the policy. The insured was covered because the comprehensive coverage "was so designated and used in terms of ordinary meaning to define the risk it assumes".

The many other issues here need not be discussed.

/s/ Thomas G. Laughlin,
Attorney for Plaintiff

* * *

1

Washington, D. C.
Tuesday, January 29, 1963

* * * * *

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RULING BY THE COURT

THE COURT: Ladies and gentlemen of the jury, this is an action for a reformation of an insurance policy, which is a matter of equity for the Court, and for damages for breach of contract and negligence which would be matters of your concern as a jury.

The defendant, Lumbermen's Mutual Casualty Company is a foreign corporation doing business in the District of Columbia and engaged in the insurance business.

The defendant, John Kroll, is a licensed insurance broker, an agent and officer of the defendant Mutual Insurance Agency, Incorporated. Mutual is an authorized agent for the defendant Lumbermen's.

The defendants Mutual and Kroll wrote a policy of insurance in 1953 in Lumbermen's from April 3rd, 1953 to April 3rd, 1954 described as a farmer's comprehensive personal liability policy. Renewals of this policy were issued annually and delivered to the plaintiff.

At the time of the incident which is the basis of this action there was in force and effect Policy Number 5L 349-795, a copy of which is attached to the complaint in this case, which policy was similar to the original policy issued and was effective from April 3rd, 1955 to April 3rd, 1956. Said policies were counter-signed in the state of Maryland and contained the same coverage.

3 On or about January 2nd, 1956, one John Nicholson, a farm employee of the plaintiff, was injured as a result of an accident while engaged in working as a farm employee for the plaintiff herein.

Subsequently, the said accident was reported by the plaintiff to the defendant, Lumbermen's, and to the defendants Kroll and Mutual.

On January 16, 1956 defendant Lumbermen's wrote a letter to the plaintiff, forwarded by registered mail, disclaiming coverage and advising the plaintiff that the reason for the disclaimer was that a farm employee is not afforded coverage while engaged in the employment of the insured,

unless said farm employee is specifically declared in the policy, and that in this instance the employee is not declared.

The letter was received by the plaintiff, and Nicholson filed, through his father and next friend, a liability and torts suit in the Circuit Court of Montgomery County, Maryland against the plaintiff on or about March 17, 1958, which suit the defendant Lumbermen's refused to defend, and which
4 suit resulted in a judgment against the plaintiff in the sum of ten thousand dollars in favor of Nicholson. Said judgment was entered by consent of the parties in the said action.

Do you have that enlarged copy of the policy?

MR. LAUGHLIN: Yes, Your Honor, right here.

(Passed to the Court.)

THE COURT: According to the terms of the policy, ladies and gentlemen of the jury, Item III of the policy provides:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges.

"The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto:

"A - Liability - \$25,000.00, each occurrence.

"B - Medical Payments - \$250.00 for each person.

"Premiums, \$14.40."

The next additional charge, "Additional farm premises, 376 acres, \$18.00."

5 Where it is listed "Farms:

"All Employees other than inservants" - blank.

"Inservants" - blank.

"Inservants - Occasional" - blank.

"Full Time Resident Employees" - blank.

So that the premium charged for this insurance was \$32.40.

There is a condition in the policy which provides:

"This policy does not apply under Coverages A and B," -- that is liability and medical payments -- "to bodily injury to or sickness, disease or death of (1) any farm employee while engaged in the employment of the insured unless farm employees are specifically declared in this policy."

It is conceded that no employees were declared in this policy as is evidenced by a copy of the policy attached to the complaint, and no premium was charged or paid to the defendant for that coverage.

That goes to whether there is a breach under Count 1.

Under Count 2 is a question for a reformation of the contract which is an equitable action which the Court rules on.

Count 3 is the negligence claim.

Defendants have filed motions for summary judgment against all three counts or, in the alternative, have requested directed verdicts by this Court, so I must rule on the motions for summary judgment.

The law is well settled that he who has the right to have an instrument reformed, which is up to me -- you have nothing to do with reformation of an instrument -- should be reasonably diligent in asserting his right. If there is an unreasonable delay relief will be denied.

If there is no applicable statute of limitations the Courts have wide discretion in determining whether or not the right to reform the instrument should be granted. However, Courts of equity will hold themselves bound by the statute of limitations that govern an action upon law upon such demand.

The statute of limitations, ladies and gentlemen of the jury, does not begin to run against the right to sue for reformation until the facts which constitute the fraud, or the mistake -- whichever it may be -- which is the ground for the reformation, are discovered, or, when by the use of due diligence, they should have been discovered.

In the case at bar, plaintiff became aware of the absence of farm employee coverage, which is the subject matter of this suit, at least when he received the letter from defendant Lumbermen's Mutual

Casualty Company dated January 16, 1956. The suit in this case which includes the count for reformation was filed January 12, 1960. These dates are not disputed.

Therefore, under Count 2, which is the count for reformation of the contract, the motion for summary judgment is granted.

There being no provision in the policy for coverage for a farm employee, there is no breach of the contract. Therefore, the motion for summary judgment as to Count 1, which is the breach of contract, is granted.

The remaining count is for negligence, and the defendants have asserted that all causes of action, including breach of contract, reformation, and the negligence, accrued more than three years preceeding the filing of the complaint herein and are, therefore, barred by the statute of limitations. So if there was any negligence that would be barred, too. Therefore, the motion for summary judgment as to the third count is granted, a mistrial is declared, and you are excused.

(There. pon, at 10:55 a.m., the above proceedings were concluded.)

* * * * *

[Filed Jan. 30, 1963]

ORDER GRANTING DEFENDANTS MOTIONS FOR SUMMARY JUDGMENT

This case having come on for trial, a jury being empanelled and after opening statement of counsel for plaintiff, the defendants and each of them having renewed their motions for summary judgment which had been previously denied without prejudice, and upon consideration of the record which includes the said motions for summary judgment, the memoranda of points and authorities filed in support thereof and in opposition thereto, the exhibits including the policy attached to the complaint filed herein, and statement of material facts filed by the defendants, admissions of the plaintiff and exhibits attached to the request for admissions, and the pretrial order; it is this 30th day of Jan, 1963;

ORDERED, that said motions be and they are hereby granted on the ground (1) that the claims asserted in Count One of the Complaint are not covered by the policy of insurance, copy of which was attached as an exhibit to the complaint; (2) that the action for reformation in Count Two of the complaint is barred by laches; and (3) that the action for negligence contained in Count Three of the complaint is barred by the statute of limitations; and

Judgment be and the same is hereby entered in favor of each defendant.

/s/ Edward M. Curran
JUDGE

Presented by:

BRAULT AND GRAHAM

By /s/ Albert E. Brault, Attorney
for Lumbermens Mutual Casualty
Company

* * *

PLEDGER AND EDGERTON

By /s/ John F. Mahoney, Jr., Attorney
for Mutual Insurance Agency, Inc.
and John E. Kroll

* * *

[Certificate of Service]

[Filed Feb. 6, 1963]

NOTICE OF APPEAL

Notice is hereby given this 6th day of February, 1963, that the plaintiff, Paul V. Finegan, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the orders and judgments of this Court entered on the 30th day of January, 1963, in favor of the defendants, Lumbermens Mutual Casualty Company, the Mutual Insurance Agency, Inc., and John H. Kroll and against the plaintiff, Paul V. Finegan.

[Certificate of Service]

/s/ Thomas G. Laughlin
Attorney for Plaintiff

BRIEF FOR APPELLEE,
LUMBERMENS MUTUAL CASUALTY COMPANY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 27 1963

No. 17,616

Nathan J. Paulson
CLERK

PAUL V. FINEGAN,

Appellant,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

a corporation,

MUTUAL INSURANCE AGENCY, INC.,

a corporation,

and

JOHN H. KROLL,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALBERT E. BRAULT

DENVER H. GRAHAM

1314 19th Street, N. W.
Washington 6, D. C.

*Attorneys for Appellee,
Lumbermens Mutual
Casualty Company*

(i)

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee Lumbermens Mutual Casualty Company the questions presented are:

1. Is a farm employee who was injured while working for the insured covered under a Farmer's Comprehensive Personal Liability Policy where said policy provides in the Declarations that the insurance afforded is only with respect to the coverages as are indicated by specific premium, where no employees were declared, where such premium is not indicated and where said policy excludes coverage of farm employees unless farm employees are specifically declared in the policy?

2. Is an action against an insurance company for reformation of an insurance policy barred by laches where the action is filed approximately four years after the insured received notice of disclaimer from the insurer stating specifically the reasons therefor?

3. Is an action against an insurance company and its agents for negligence in the issuance of an insurance policy barred by the statute of limitations where the action is filed more than six years after the issuance of the original policy and approximately four years after the insured received written disclaimer of coverage as to an alleged loss stating specifically the reasons therefor?

(iii)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,616

PAUL V. FINEGAN,

Appellant,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY,
a corporation,

and

MUTUAL INSURANCE AGENCY, INC.,
a corporation,

and

JOHN H. KROLL,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE
LUMBERMENS MUTUAL CASUALTY COMPANY

COUNTERSTATEMENT OF THE CASE

Shortly after purchasing two farms in Montgomery County, Maryland, appellant contacted appellee John H. Kroll, an insurance broker

with whom he had dealt for a number of years for the purpose of insuring the farms. Appellant in his deposition stated that Mr. Kroll recommended a Farmer's Comprehensive Personal Liability Policy which appellant ordered (J.A. 16). Said policy was issued to him on April 3, 1953 for a period of one year. It was executed and delivered in Montgomery County, Maryland.

The policy in question provided in the Declarations, Item 3, that:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges . . ."

The policy declarations disclose a premium of \$14.40 for liability coverage of \$25,000.00 for each occurrence and \$250.00 medical payments for each person. No other premium charge is indicated and the item for farm employees and employers liability minimum premium is blank and no farm employees are declared in the Declarations (J.A. 16).

The policy in question contains certain exclusions and conditions. Under Exclusions, the policy provides:

"This policy does not apply:

* * * * *

"(d) under Coverages A and B, to bodily injury to or sickness, disease or death of (1) any farm employee while engaged in the employment of the insured unless farm employees are specifically declared in this policy; . . ."
(J.A. 14).

Under the caption Conditions, paragraph numbered 1, provides as follows:

"1. Premium. Coverages A and B. The premium for insurance with respect to injury to farm employees is an estimated premium only. After each anniversary and upon termination of this policy, the named insured shall notify the company of any change during the policy period in the number of farm in-servants and in the remuneration earned by other farm employees; and the earned premium for such insurance shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the

estimated advance premium paid for such insurance, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by said insured." (J.A. 14).

Similar renewal policies were issued annually including April 3, 1955.

Appellant testified in a deposition that he did not read the policy completely when it was received in April 1953 but admitted reading the typed portions of Items 1, 2 and 3 and doing the same upon receipt of the renewal policies (J.A. 29-30).

Appellant never made any inquiry as to insurance coverage for his employees (J.A. 31). Appellant is approximately 57 years of age and holds the degrees of Bachelor of Arts and Bachelor of Laws, is employed in administrative work in the United States Post Office Department and is a member of the District of Columbia Bar (J.A. 27-28).

On January 2, 1956 while the third renewal policy was in effect one John Nicholson, a farm employee of the appellant was injured while working as a farm employee for the appellant. The injury was promptly reported to the appellee Lumbermens Mutual Casualty Company and on January 16, 1956 said appellee wrote a letter to the appellant disclaiming coverage advising that the reason for the disclaimer was that a farm employee is not afforded coverage while engaged in the employment of the insured, unless said farm employee is declared in the policy, and no farm employee was so declared (J.A. 44). Said letter was received by appellant on January 18, 1956 (J.A. 20-21).

Thereafter on November 12, 1956 the appellant sued this appellee in the Circuit Court for Montgomery County, Maryland in which action he claimed the benefits of said insurance policy on account of the injury to John Nicholson both for liability and medical payment. A demurrer to the declaration was sustained by the Court and thereafter an amended declaration was filed claiming only \$250.00 due under the medical payment coverage of said policy. Said action was dismissed without prejudice by the appellant on January 13, 1960 (J.A. 48).

On March 17, 1958, Mr. Nicholson, a minor, by his father and next friend sued appellant in the Circuit Court for Montgomery County, Maryland for damages for the injuries which he had sustained and medical expenses. Appellee Lumbermens Mutual Casualty Company refused to defend this action and appellant then engaged his own counsel. Said action was terminated by a consent judgment for the plaintiff in the amount of \$10,000.00. Appellant claims from appellees said sum of \$10,000.00 plus medical expenses of \$1,486.51 and \$875.00 attorneys fees.

The appellant filed his complaint in the United States District Court for the District of Columbia on January 12, 1960. The complaint is in three counts. Count One of the Complaint is an action for breach of contract alleging that the appellee Lumbermens Mutual Casualty Company wrongfully refused to defend the action filed against the appellant by Nicholson and to pay the medical expenses, attorneys fees and damages which the appellant was required to pay. Count Two is for reformation of the policy of insurance alleging that through mutual mistake and error the appellees failed to declare the appellant's employees in the policy and prays that said policy be reformed to reflect the true intent of the parties regarding the scope of liability coverage contemplated at the time the policy was issued. Count Three is based upon the alleged negligent issuance of the policy by the appellee Kroll individually and as agent for the other appellees (J.A. 4-12).

In its answer this appellant asserted that the claims were barred by the statute of limitations, admitted that the appellant gave notice of the accident involving Nicholson, that he was then engaged as a farm employee of the appellant, that this appellee disclaimed coverage and refused to defend, that written notice of such disclaimer was given to the appellant on January 16, 1956, and that said claim was not covered by the policy. As to Count Two of the Complaint appellee denied that the policy was issued through mutual mistake and that the filing of the action for reformation was barred by laches. As to Count Three this appellee denied negligence and asserted contributory negligence on the part of the

plaintiff. This appellee denied in its answer that the appellee Mutual Insurance Agency is a general agent for Lumbermens Mutual Casualty Company but admitted that the appellee Kroll was an officer and agent of Mutual Insurance Agency and that said agency is an agent of this appellee (J.A. 39-43).

Motions for summary judgment were filed by appellees on the ground that the actions were barred by the statute of limitations and were not covered under the policy. These motions were denied by the Court (J.A. 23-25-26). However, on March 21, 1961 the Court entered an order modifying the original order denying the motions for summary judgment and ordering that said motions for summary judgment were denied without prejudice to the defendants to file additional motions for summary judgment (J.A. 39).

Following the opening statement of appellant's counsel at the trial of the action, appellees renewed their motions for summary judgment or in the alternative for directed verdict (J.A. 64). The motions for summary judgment were granted by the Court (J.A. 69-73).

SUMMARY OF ARGUMENT

The first count of the complaint filed by appellant is an action to recover certain sums alleged to be due under a Farmer's Comprehensive Personal Liability Policy issued by appellee Lumbermens Mutual Casualty Company to the appellant through its agents, appellees Mutual Insurance Agency and John H. Kroll. The declarations provided that the insurance afforded was only with respect to such and so many of the coverages as are indicated by specific premium charge or charges. Premium charges were declared only for liability and medical payment coverages. There was no premium declared or charged for farm employees. The policy further provides that injury to farm employees is excluded unless specifically declared. The claim asserted by appellant results from injury to a farm employee. Since farm employees are not declared, the policy does not cover such an injury. The language of the

policy in question is clear and unambiguous and therefore not subject to any other interpretation by the court. There being no genuine issue of material fact, it was not error to grant summary judgment to the appellees.

The second count of the complaint is for reformation of the insurance policy. Summary judgment was granted to the appellees on the ground that the claim for reformation is barred by laches. The appellant knew or by exercise of reasonable diligence should have been familiar with the extent of coverage under his policy when the original policy was delivered to him in April, 1953. Similar renewal policies were delivered to him annually thereafter until April, 1955. While the last policy was in effect on January 2, 1956, appellant's farm employee was injured. The appellee insurer promptly advised appellant that the claim was not covered under its policy because farm employees had not been declared, and denied coverage. Appellant knew, upon receipt of said letter in January 1956, that the insurer denied coverage and the reasons therefor. The time for filing suit, therefore, began to run no later than January 1956. The action for reformation was not filed until four years later, in January, 1960. There being concurrent jurisdiction equity follows the law, and must apply the statute of limitations which is three years. Since the action for reformation accrued more than three years prior to the filing of said action, it is barred by laches, and summary judgment was properly granted.

The third count of the complaint is based upon the alleged negligent issuance of the insurance policy to the appellant by the appellees Mutual Insurance Agency and John H. Kroll individually and as agents of appellee Lumbermens Mutual Casualty Company. The original policy was issued in April, 1953, and two similar renewal policies issued annually thereafter. If said policies were negligently issued the act of negligence occurred when the policy was originally issued and the time to sue would begin to run as of that date. The latest date when the cause of action accrued would be when appellant's farm employee was injured and appellant

was advised that the insurer disclaimed coverage. This occurred more than three years prior to the filing of this action and, therefore, summary judgment was properly granted.

ARGUMENT

I

The Policy of Insurance Was Clear and Unambiguous, It Does Not Cover the Loss Described in the Complaint and Summary Judgment Was Therefore Properly Granted

The motion of the appellee Lumbermens Mutual Casualty Company for summary judgment as to Count One of the Complaint was granted by the Court on the ground that the claims asserted in said Count are not covered by the policy of insurance, copy of which is attached as an Exhibit to the Complaint (J.A. 73).

The insurance policy in question was executed in Maryland (J.A. 16), delivered in Maryland, covered Maryland property, and its performance obligated in Maryland, therefore, as to construction of the policy Maryland law applies. Appellant concedes this (Appellant's Brief 10). Fairclough v. Fidelity and Casualty Company of New York, 1924, 54 App. D.C. 286, 289, 297 F. 681; Republic of China v. National Union Fire Insurance Company of Pittsburgh, 151 F. Supp. 211, affirmed 254 F.2d 177 (1957 4th Cir.); Levin v. John Hancock Mutual Life Insurance Company, 41 A. 2d 841, Municipal Court of Appeals for the District of Columbia, 1945.

The insurance policy in question is clear and unambiguous. In Item 1 is given the named insured and address and location of the principal farm premises. Item 2 states the policy period. Item 3 consists of two printed paragraphs and a schedule of premiums, limits of liability and coverages (J.A. 16). In his deposition appellant testified that he did not read the entire policy. However, he did say that he read Items 1, 2 and 3 and explained that he read the typed portions only (J.A. 29-30).

The appellant is a well educated and intelligent man employed in an administrative capacity in the United States Post Office Department and a member of the District of Columbia Bar (J.A. 27). A casual reading of those portions of the policy which he said he had read would disclose that the insurance afforded was only as to such and so many of the coverages as are indicated by specific premium charge or charges (Item 3, J.A. 16). There is nothing ambiguous about the language of Item 3 which states:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific charge or charges. The limit of the company's liability against such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto."
(J.A. 16).

The policy clearly discloses that the only premium charge was for liability coverage, \$25,000.00 limit for each occurrence and \$250.00 medical payments for each person. There are no premium charges shown for coverage as to farm employees and hence no coverage for this type of risk exists as stated in the printed portion of Item 3 (J.A. 16).

Under the exclusions the policy provides as follows:

"This policy does not apply:

* * * * *

"(d) under Coverages A and B, to bodily injury to or sickness, disease or death of (1) any farm employee while engaged in the employment of the insured unless farm employees are specifically declared in this policy; . . ."
(J.A. 14).

Under the caption of the policy "Conditions" it provides as follows:

"1. Premium. Coverages A and B. The premium for insurance with respect to injury to farm employees is an estimated premium only. After each anniversary and upon termination of this policy, the named insured shall notify the company of any change during the policy period in the number of farm in-servants and in the remuneration earned by other farm employees; and the earned premium for such insurance shall be computed in accordance with the company's

rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid for such insurance, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by said insured." (J.A. 14).

The above language is clear and explicit. It is not subject to more than one interpretation and hence cannot be said to be ambiguous.

The law is well settled that if the language of the policy is clear there is no room for construction and it is to be applied in its ordinary meaning; Employers' Liability Assurance Corporation Limited v. Reed's Refrigeration Service, Inc., 158 A.2d 616, 222 Md. 49, (1960); precluding any interpretation on the part of the Court, Mohawk Valley Fuel Co. v. Home Indemnity Co., 165 N.Y.S. 2d 357.

The policy does not cover farm employees and the terms of the policy cannot be extended by forced construction where the language is clear and the meaning plain. John Hancock Mutual Life Insurance Company of Boston v. Plummer, (1942) 28 A.2d 856, 181 Md. 140. The Court cannot disregard the definite terms of an insurance policy and make a new contract for either party. Union Trust Company of the District of Columbia v. Continental Casualty Company, (1952) 90 U.S. App. D.C. 216, 194 F.2d 901, Aetna Casualty and Surety Company v. Harvey W. Hotel, Inc., 110 U.S. App. D.C. 80, 289 F.2d 457.

Appellant argues that he did not scrutinize his policy when it was received and it was not his duty to do so. We do not agree. The front of the policy itself cautions, "Please read your policy" (J.A. 16). Appellant testified that he did examine the policy when received (J.A. 29) and the renewals thereof (J.A. 30). It was stipulated at pretrial that the policy in effect at the time of the loss was similar to the one originally issued (J.A. 44). It was appellant's duty to acquaint himself with the contents of the policy. If he failed to do so he is nevertheless presumed to know its contents for the rule is that one who is presented with an insurance policy has the duty to read it and is presumed to know its contents.

"When an insured purchases an original policy of insurance he may be expected to read it and the law may fairly impose upon him such restrictions, conditions and limitations as the average insured would ascertain from such reading." Bauman v. Royal Indemnity Company, (1961) 174 A.2d 585, 591, 36 N.J. 12; John Hancock Mutual Life Insurance Company v. Cohen, 9th Cir., 254 F.2d 417 (1958); W. B. Copper-smith and Sons v. Aetna Insurance Company, 21 S.E. 2d 838, 222 N.C. 14 (1942).

The following language of the Supreme Court of the United States in Upton v. Tribilcock, 91 U.S. 45, 23 L. Ed. 203 (1875); is particularly pertinent:

"It will not do for a man to enter into a contract and when called upon to respond to its obligations to say that he did not read it when he signed it or did not know what it contained. If this were permitted contracts would not be worth the paper on which they were written, but such is not the law. A contractor must stand by the words of his contract and if he will not read what he signs, he alone is responsible for his omissions."

"The signing of a written contract is not necessarily essential to its validity. It is equally efficacious if a written contract is prepared by one party and delivered to the other party and acquiesced in by the latter." W. B. Copper-smith and Sons v. Aetna Insurance Company, *supra*.

Even though appellant had as many as 15 employees on his farms during the policy periods he never advised his insurance broker of this fact, nor did he make any inquiry of anyone regarding insurance coverage for his employees even though the policies delivered to him clearly disclosed that no such coverage had been issued (J.A. 30-31, 36-37, 55).

Appellant states in his brief at page 12 that it is the custom and usage in the insurance trade to only list and ascertain the number of employees at the end of the policy period. Though there is nothing in the record to justify this, assuming that statement to be correct, the policy in question clearly requires that coverage does not extend to farm employees unless they are declared and a minimum premium is charged and reflected in the Declarations of the policy. It will be noted that there was no minimum premium charged for employers liability nor were there any employees declared (J.A. 16).

The coverage in this policy is indicated by a minimum premium and the final premium is based upon the actual remuneration of employees during the policy period. That, as appellant states in his brief at page 12 is the customary method of writing workmens compensation insurance. The difference, of course, is that under workmens compensation insurance the insurer obligates itself to cover the employees of its insured for which it charges a minimum premium subject to final audit whereas in the case at bar the policy did not cover any employees because no such coverage was indicated in the policy and the insured at no time requested such coverage or disclosed that he had employees (J.A. 31). Since the policy as written and as renewed did not cover employees there was no reason for the insurer to audit appellant's books as it had a right to do under Condition 2 of the policy (J.A. 14). The language of the policy permitting the insurer to inspect the premises and audit the books did not impose any duty to so inspect or audit upon the carrier. On the contrary, Condition 2 of the policy required the appellant to advise the company as to the remuneration of his employees (J.A. 14).

The first count of the complaint is an action for breach of contract wherein appellant seeks to recover the amount paid by him for medical expenses, damages and attorneys fees as a result of a claim for personal injuries sustained by John Nicholson while engaged as a farm employee by the appellant. There are no factual issues since appellees admit that the policy in question was issued and was in effect on the date Nicholson was injured (J.A. 17, 40, 44). It was stipulated at pretrial that John Nicholson was injured while engaged as a farm employee by the appellant (J.A. 44). The pleadings, depositions and admissions contained in this record clearly establish that there is no genuine issue as to any material fact as to Count One of the Complaint, therefore, summary judgment is appropriate and was properly granted (Rule 56 F.R.C.P.).

II

**The Second Count of the Complaint for
Reformation of the Insurance Policy Is
Barred by Laches and Summary Judgment
Was Properly Granted.**

The second count of the complaint is for reformation of the insurance policy. The motion of this appellee for summary judgment as to Count Two was granted on the ground that it was barred by laches (J.A. 71, 72).

Laches and the statute of limitations are affirmative defenses and were pleaded by the appellee in its answer to the complaint, and asserted in the pretrial proceedings (J.A. 39, 43, 48, 49).

The original policy was issued to the appellant effective April 3, 1953 for the period of one year and renewal policies in similar form were issued and delivered to the appellant annually thereafter. The third renewal was in effect on the date of the injury to John Nicholson which occurred on January 2, 1956. The accident was promptly reported by appellant to the appellee. On January 16, 1956 this appellee wrote a letter to the appellant disclaiming coverage for the reason that a farm employee is not afforded coverage while engaged in the employment of the insured unless said farm employee is specifically declared in the policy and that said employee was not declared. These facts were conceded in the pretrial proceeding (J.A. 44). The letter of disclaimer was received and acknowledged by the appellant (J.A. 19-23).

Having received notice of disclaimer appellant thereafter on November 13, 1956 acted upon it by filing an action against this appellee in the Circuit Court for Montgomery County, Maryland in which action he claimed the benefits of the above described insurance policy on account of the injury to the said John Nicholson both for liability and medical payment. A demurrer was filed to said declaration and sustained by the court. Thereafter, an amended declaration was filed claiming only \$250.00 due under the medical payment coverage of said policy. This action was

dismissed without prejudice by the appellant on January 13, 1960 (J.A. 24, 40). An action for reformation or declaratory judgment could have been prosecuted in the action filed against this appellee in the Maryland Court. However, appellant chose to dismiss that action and file a new action in the District of Columbia. The new action was filed on January 12, 1960 within a few days of four years after the notice of disclaimer was received by the appellant. (The notice was received by appellant on January 18, 1956.) (J.A. 20-21). A suit to reform a contract for mistake must be brought without unreasonable delay and the time for suing begins to run from when the mistake could have been discovered by using due diligence. Citizens Mutual Fire Insurance Company of Cecil County v. Conowingo Bridge Company, 82 A 372, 116 Md. 422 (1911); William Dall v. Butcher, 107 A. 527, 135 Md. 25 (1919); Cunningham v. Taylor, 35 App. D.C. 569 (1910).

If, in fact, there was a mutual mistake in the issuance of the policy, which the appellees have denied, the mistake occurred when the original policy was written in April 1953. The appellant, therefore, had the opportunity to discover such mistake when the original policy was delivered to him and on each of the two subsequent occasions when the renewal policies were received annually thereafter. Although he testified that he read Item 3 of the Declaration which contains the pertinent language excluding coverage of farm employees unless a premium is indicated therefor (J.A. 29-30) he made no complaint about lack of coverage and never made any inquiry regarding coverage for his employees (J.A. 30-31).

The latest time when appellant could have become aware of the coverage problem was on the date when he received a written letter of disclaimer from the appellee stating the reasons therefor. While we contend that the time to file an action for reformation began to run when the original policy was issued (there is nothing in the record to indicate that there were any subsequent conversations on this subject between Kroll and the appellant) there can be no dispute that it began to run upon notice of disclaimer being given to appellant in January 1956. Appellant admitted

in his deposition that he knew in January and February 1956 that the appellee disclaimed coverage (J.A. 35).

This Court has held that without regard to the analogy of the statute of limitations a plaintiff seeking a remedy in equity for fraud must exercise his right within a reasonable time after the discovery of a fraud. George v. Ford, 36 App. D.C. 315 (1911). The statute of limitations in the District of Columbia is three years. This action could be barred by laches even sooner than three years but certainly it should be barred where appellant waited four years before filing its action.

We further suggest that equity and justice require the application of the doctrine of laches for the reason that when this claim arose had there been coverage under its contract of insurance the appellee would have undertaken to investigate settle or defend the claim in question but because there was no coverage the appellee properly refused to defend the claim and immediately upon receiving notice advised appellant of its position and the reason therefor. If appellant was entitled to have his policy reformed so as to cover the claim, he should have filed his action within a reasonable time thereafter so that the appellee would have been afforded the opportunity to defend the action if the policy were in fact reformed by the Court.

He who has the right to have an instrument reformed should be reasonably diligent in asserting his right. If there is an unreasonable delay relief will be denied. 45 Am. Jur. Sec. 82, page 634.

In cases of concurrent jurisdiction such as we have here courts of equity will hold themselves barred by the statute of limitations that would govern an action at law upon the same demand. Washington Loan and Trust Company v. Darling, 21 App. D.C. 132 (1903).

Appellant concedes this to be the law and cites several cases in support thereof (Appellant's Brief, page 28).

The statute of limitations applicable to this action is Title 12, Section 201 District of Columbia Code, 1961 Edition which provides that:

" . . . No action, the limitation of which is not otherwise specifically prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued; . . ."

This Court has stated in Washington Loan and Trust Company v. Darling, *supra*, page 140:

"The doctrine has been too long established to require citation of authority, that in cases of concurrent jurisdiction courts of equity will hold themselves bound by the statute of limitation that would govern an action at law upon the same demand; and where the subject-matter of the demand is one ordinarily cognizable at law, but, by reason of special conditions, the remedy for its enforcement in the particular case is obtainable solely in equity, the bar of limitation will be applied, either in obedience to the statute, or by analogy, in the same way as at law."

Anglo-Columbian Development Co. v. Stapleton, 57 App. D. C. 209, 19 F.2d 683 (1927); Metropolitan National Bank of New York v. St. Louis Dispatch Co., 149 U.S. 436, 13 S.Ct. 944, 947, 37 L.Ed. 739; Baker v. Cummings, 169 U.S. 189, 18 S.Ct. 367, 42 L.Ed. 711; Sterns v. Page, 7 How. 819, 12 L.Ed. 928; Patten v. Warner, 11 App. D.C. 149.

The appellant argues that laches is not applicable because this is an action for indemnity which does not arise until the obligation is incurred or payment is made by the insured. We agree that if this were an action for indemnity the statute of limitations would not be applicable.

In fact, limitations is not pleaded by any of the defendants to Count One of the Complaint because they recognize this as an action for indemnity based upon an alleged breach of the policy contract. Their defense to that count is based upon the fact that there was no coverage for this claim under the terms of the policy. We contend, however, that laches is applicable because the denial of coverage and reasons therefor were made known to the appellant four years before he brought his suit for reformation and if there was any mistake in the preparation of the policy that mistake was known to the appellant no later than January 1956 and

under the law cited above the time for suing for reformation began to run no later than that date.

Summary judgment is appropriate where the facts clearly disclose laches or a failure to institute suit within the time prescribed by the statute of limitations. Moore's Federal Practice, Second Edition, Volume 6, Sec. 56.17, p. 2227-2228; Dixon v. American Telephone & Telegraph Co., 2d Circuit 1947, 159 F.2d 863, 864, Cert. den. 332 U.S. 764, 68 S.Ct. 69, 92 L.Ed.350.

Since appellant's cause of action accrued more than three years prior to filing of his action for reformation, and there being no genuine issue of material fact as to laches, appellees' motion for summary judgment as to Count Two of the Complaint was properly granted.

III

Summary Judgment Was Properly Granted as to the Third Count of the Complaint on the Ground That the Alleged Negligent Issuance of the Insurance Policy Is Barred by Statute of Limitations.

Count Three of the Complaint is based on negligence. Appellant charges that appellees were negligent in the issuance of the insurance policy without coverage for its employees. This count of the complaint refers to the policy which was in effect at the time of the injury to Nicholson namely the policy which was issued on April 3, 1955.

Appellees' motions for summary judgment were granted as to this count on the ground that the action was barred by the statute of limitations.

The limitation applicable to this action is three years as provided in Title 12, Section 201, District of Columbia Code, 1961 Edition.

Appellant argues that the policy issued by appellee is a contract of indemnity and, therefore, the statute of limitations does not begin to run until actual loss or damage occurs. We have no quarrel with that statement. The action in Count One of the Complaint was based on the contract

of insurance and appellee does not claim that action is barred by the statute of limitations. However, the action in Count Three of the Complaint is not for indemnity under the terms of the contract but is based upon negligence in the issuance of the policy.

The law is well settled that in an action for negligence the statute of limitations begins to run from the time of the breach of duty.

In an action brought against an attorney by his client for neglect and unskillful conduct in the handling of a case the Supreme Court of the United States said:

"The grounds of action here is a contract to act diligently and skillfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted, is the question; for from that time the statute must run. When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proven, and no more recovered; but on the other hand it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury even up to the day of the verdict. If so, it is clear that the damage is not the cause of the action." Wilcox v. Plummer's Executors (1830) 4 Peters 172, 9 Decisions of the Supreme Court Curtis 43, 29 U.S.S.C. Reports 172.

While this is a very old decision it has been cited and relied upon both in Maryland and the District of Columbia in the following cases: Hahn v. Claybrook (1917) 130 Md. 179, 100 A. 83. This was an action for malpractice by a patient against a physician. The following language of the Court in its opinion is pertinent to the case at bar:

"It is clear and well settled that if the plaintiff's right of action arose and accrued more than three years before the suit was begun then the relief here sought must be denied and this presents the controlling question on this branch of the case, and that is, when did the act or wrong occur from which she sustained the injury for which she seeks damages in this case, and when did that injury become apparent, so as to give the plaintiff a right of action and to then bring a suit?"

The Court further states:

"The general rule in cases of neglect of duty arising from contract and the breach of a professional duty by a physician, surgeon or an attorney is held to fall within this rule and is correctly stated and supported by authority in 25 Cyc 1116. In cases of negligent performance of a contract or neglect of some duty imposed by contract the cause of action accrued and the statute begins to run from the time of the breach or neglect, not from the time when consequential damages result or become ascertained; for the cause of action is founded on the breach of the duty, not on the consequential damage and the subsequent accrual or ascertainment of such damage gives no new cause of action."

The Court also quotes from the case of Wilcox v. Plummer's Executors, supra.

Appellee concedes that as to the statute of limitations the law of the District of Columbia where the action was brought applies. The law does not appear to be any different in the District of Columbia.

The Municipal Court of Appeals, now the District of Columbia Court of Appeals in Poole v. Terminix Company of Maryland and Washington (1951) 84 A.2d 699 in which the case of Wilcox v. Plummer's Executors supra is cited is to the same effect. This was an action for unworkmanlike insulating activities of the defendant. The Court held that:

"If legal injury was a natural consequence of the defendant's act, no matter how slight, the damage, in the absence of fraud, limitations will start to run from the time the wrongful act was committed and even before ascertainment of the damages can be had. Mere want of knowledge by the owner of injury to his property does not prevent the running of the statute."

In affirming this decision this Court in 91 U.S. App. D.C. 287, 200 F.2d 746 stated:

"The suit was filed more than three years after the work was done but within three years from the time the alleged injury was discovered. Plaintiff contends that the statute did not begin to run until such discovery or by the exercise of ordinary diligence he could have discovered the breach. He

relies upon P. H. Sheehey Company v. Eastern I. & Mfg. Company, (1915) 44 App. D.C. 107, L.R.A. 1916 F. 810. But we think that decision must be limited to a situation where the discovery has been prevented by fraud as suggested by the Court's opinion."

This rule is followed in the Hanna case relied on by the appellant, Hanna v. Fletcher, 97 U.S. App. D.C. 310, 231 F.2d 469 (1956):

"The action against Gichner plainly is based on negligence, sounds in tort, and did not accrue until injury resulted from the alleged negligence. Poole v. Terminix Co., 91 U.S. App. D.C. 287, 200 F.2d 746 is not apposite; it was an action for property damages due to breach of an implied warranty to do a workmanlike job. There the suit would have been timely if the limitations period were measured from the time the damage was discovered. The Court held, however, that the suit was barred because the cause of action accrued when the warranty was breached more than three years before the action was filed."

The alleged breach of duty on the part of the appellant's agent Kroll occurred when he issued and delivered the policy in question either in April 1953 or as contended by the appellant in April 1955. However, even if the cause of action did not occur until the breach was discovered, here as in the Hanna case, when the injury occurred, namely the appellee's disclaimer of coverage and refusal to honor the claim, the action is not timely filed because this discovery and injury occurred more than three years prior to the filing of this action.

Appellant's contention that the statute of limitations begins to run when the amount of consequential damages have been ascertained is not supported by any authorities, is contrary to the established law of this jurisdiction and is without merit.

Since the action based upon negligence in Count Three of the Complaint is barred by the statute of limitations and there being no dispute as to the facts the motion for summary judgment as to that count of the Complaint was properly granted.

CONCLUSION

Since the admitted facts, pleadings, and pretrial proceedings disclose that the appellant's claim under the first count of the Complaint was not covered under the policy; that the second count for reformation was barred by laches; and the third count for negligence was barred by the statute of limitations, there being no genuine issue as to any material fact, appellees' motion for summary judgment as to each count of the Complaint was properly granted and should be affirmed.

Respectfully submitted,

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BRIEF FOR APPELLEES MUTUAL INSURANCE
AGENCY, INC. AND JOHN H. KROLL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,616

PAUL V. FINEGAN,

Appellant,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY,
a corporation, and

MUTUAL INSURANCE AGENCY, INC.,
a corporation, and

JOHN H. KROLL,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 27 1963

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(i)

STATEMENT OF THE QUESTION PRESENTED

In the opinion of these appellees the question is:

Where plaintiff alleges a breach of duty to perform a service and sues the alleged tortfeasor and his principal in alternative counts for reformation and damages for negligence, was the Court below correct in holding:

1. That the Statute of Limitations on the negligence count commenced to run from the time of the breach of duty and not when the damages, the full extent of which were dependent on another suit, were ascertained;
2. That plaintiff was guilty of laches, barring his suit for reformation, as his knowledge of the alleged mistake for which he brings this action antedated the filing of the complaint by more than four years?

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United States Court of Appeals

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JOHN H. KROLL,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES MUTUAL INSURANCE
AGENCY, INC. AND JOHN H. KROLL

COUNTERSTATEMENT OF THE CASE

For the purposes of this brief the parties will be referred to as they were below, and for the sake of brevity the appellees Lumbermens Mutual Casualty Company, Mutual Insurance Agency, Inc. and John H. Kroll will be referred to as Lumbermens, Mutual and Kroll, respectively.

Defendant Kroll is a licensed insurance broker and President of defendant Mutual, an authorized insurance agent of defendant Lumbermens. Kroll at the request of plaintiff wrote a policy of insurance for Lumbermens described as a Farmers' Comprehensive Personal Liability Policy effective from April 3, 1953 to April 3, 1954, which policy was delivered to plaintiff, and later followed by two annual renewals (J.A. 44).

On or about June 2, 1956, when the second renewal of the aforesaid policy was in effect, one, John Nicholson, a farm employee of the plaintiff, was injured as the result of an accident while engaged in working as a farm employee for the plaintiff (J.A. 44). The following day plaintiff notified Kroll by telephone of the accident (J.A. 23). By letter dated January 16, 1956 plaintiff was notified by Lumbermens that his policy did not cover injuries to farm employees (J.A. 20). In reply plaintiff wrote Lumbermens a letter dated January 20, 1956 in which he suggests that coverage is in order for the reason that Mr. Nicholson, the farm employee, was "merely giving me some casual help" and would not therefore be classified as a farm employee (J.A. 21, 22).

There was no subsequent correspondence or communication otherwise between plaintiff and any of the defendants which in any way modified, altered or changed the position of Lumbermens with respect to its disclaimer of coverage (J.A. 19).

On or about March 17, 1958, Nicholson, a minor, through his father and next friend, brought suit against plaintiff, which Lumbermens refused to defend, and this suit resulted in a consent judgment in the sum of Ten Thousand Dollars (\$10,000.00) in favor of Nicholson (J.A. 45). Plaintiff then, on November 12, 1956, brought suit against Lumbermens only in the Circuit Court of Montgomery County for breach of contract, which was dismissed without prejudice (appellant's brief, p. 5). On January 12, 1960, approximately four years after Nicholson's injury and the disclaimer of coverage, the present suit was instituted against all defendants (J.A. 1). There was no suit or other proceeding instituted against defendants

Mutual or Kroll prior to the filing of this action (J.A. 19, 23).

In this action plaintiff alleges that defendant Kroll "negligently * * * wrote and issued the policy of insurance;" (J.A. 46), and that by mutual mistake of fact and error of the plaintiff and defendant Kroll employee coverage was not declared on the policy (J.A. 47). It is significant to note that although plaintiff claims that farm employee coverage should have been included in his policy of insurance with Lumbermens because of his conversations with Kroll, plaintiff's letter dated so close in time to the incident in question makes no reference thereto. Indeed, it contests the disclaimer of coverage on an entirely different basis (J.A. 21, 22).

At the conclusion of plaintiff's opening statement, defendant renewed their motions for summary judgment, which were previously denied without prejudice by another Judge (J.A. 39), or in the alternative moved for directed verdicts (J.A. 64), and the lower Court found that the claims asserted in Count I of the complaint were not covered by the policy of insurance; that the action for reformation in Count II of the complaint was barred by laches, and that the action for negligence in Count III of the complaint was barred by the Statute of Limitations (J.A. 73). Judgments were entered thereon and this appeal followed.

STATUTE INVOLVED

D. C. Code, Title 12-201, 1961 Ed.:

"No action shall be brought * * * upon any simple contract, express or implied, or for the recovery of damages for any injury to real or personal property, or for the recovery of personal property or damages for its unlawful detention after three years from the time when the right to maintain any such action shall have accrued; * * * and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued; * * *."

SUMMARY OF ARGUMENT

The gravamen of the action against Mutual and Kroll is for breach of duty in failing to provide the insurance coverage requested. This breach occurred, if at all, when the policy in question was issued – in April 1955. When Nicholson, the farm employee, was injured on January 2, 1956 and plaintiff received Lumbermens' disclaimer of coverage therefor on January 18, 1956, an "injury" resulted to plaintiff and his cause of action for negligence against Kroll and Mutual or for reformation accrued, and the Statute of Limitations began to run.

Admittedly, his cause of action on the contract, or policy of insurance, for indemnity did not accrue until he incurred an obligation to pay the Nicholson judgment. But neither Mutual nor Kroll are involved in the contract action – Count I of the complaint.

Therefore, as plaintiff waited for about four years to sue Mutual and Kroll, his action for negligence, Count III, is barred by the three-year Statute of Limitations, D. C. Code, Title 12-201, 1961 Ed., and his suit for reformation, Count II, is barred by laches, as equity follows the law in this case and the Statute of Limitations would bar the concurrent legal remedy.

ARGUMENT

I

**In the Suit Against Mutual and Kroll for Negligence
In Failing to Perform a Service the Statute of
Limitations Began to Run from the Occurrence of
The Alleged Breach of Duty, Which Occurred More
Than Three Years Prior to the Filing of this Action.**

Toward the conclusion of appellant's brief he poses the following question which succinctly sets forth his position concerning the defense of the Statute of Limitations. The question is this (p. 29):

"* * *. The trial Court was in error in applying the bar of laches and the statute of limitations to Counts II and III of the complaint. If they did apply, why did they not also apply to Count I (breach of contract)?"

The Statute of Limitations in the suit against Lumbermens for breach of contract, it is admitted, would not commence to run until after the settlement of the Nicholson suit instituted on March 17, 1958 in Montgomery County, Maryland, and, as the present suit was filed in this Court on January 12, 1960, the action on the contract would be timely filed. The defense to Count I, the alleged breach of contract, does not involve Mutual and Kroll and accordingly the merits thereof are not discussed in this brief. The suit against them in Counts II and III for reformation and negligence, respectively, is predicated on an entirely different ground and these causes of action accrued when the breach of duty occurred, not when the policy was allegedly breached. Of course, the time when a duty is breached depends upon the nature of the duty. Kroll's duty was to furnish the requested coverage. Plaintiff claims that he did not do so and was therefore negligent. He seeks damages for this alleged breach of duty or, in the alternative, seeks to reform the contract, asserting a mutual mistake of fact (J.A. 46, 47).

As a general rule, in an action against an agent for negligence or unskillfulness the Statute of Limitations begins to run from the time the negligent or unskillful act was committed. Wilcox v. Plummer, 1830, 29 U.S. (4 Pet.) 172, 181, 7 L. Ed. 821; Aachen and Munich Fire Insurance Company v. Morton, 1907, 6 Cir., 156 F. 654; 34 Am. Jur. § 161, p. 128, § 180, p. 145. The alleged negligent "writing and delivering of the policy" of insurance occurred in April 1955, as indicated by the effective dates of the policy of insurance (J.A. 15, 16) and this alleged negligence ripened into an actionable tort after Nicholson was injured and Lumbermens disclaimed coverage under the aforementioned policy. Hanna v. Fletcher, 1956, 97 U.S. App. D.C. 310, 231 F. 2d 469, 58 A.L.R. 2d 847, cert. den. 351 U.S. 989. At this juncture, there was an "injury" to plaintiff. He would have to defend the claim himself with a potential personal liability

for any judgment rendered against him. The damages were not yet ascertainable, but proof of actual damage may extend to facts that occur and grow out of the injury even up to the day of the verdict. Wilcox v. Plummer, supra. Even though plaintiff were to be exonerated from liability if the Nicholson suit had gone to jury verdict, he still would have sustained an "injury" as he was at least required to defray the costs of defending it. It was incumbent on him, therefore, to institute his suit against Mutual and Kroll on or before January 18, 1959, three years after the date of receipt of Lumbermens' letter disclaiming coverage (J.A. 21).

The Wilcox case is an authoritative case on this issue. This was an action in assumpsit to recover the amount of a loss sustained by the negligent and unskillful conduct of an attorney in litigation. A promissory note was placed in the attorney's hands for collection by suit against the maker and endorser. The maker alone was sued and judgment had, but the maker proved to be insolvent. Suit was then brought against the endorser, which action was nonsuited for a negligent misnomer of the plaintiff. By the termination of this action the statute had run in favor of the endorser. The issue in this case was whether the Statute of Limitations commenced running when the error was committed in the commencement of the action against the endorser, or only when the actual damage was sustained by the loss of the debt through the bar of the statute in favor of the endorser. The Supreme Court held that the statute began to run when the negligent act of the attorney was committed, and, among other things, stated:

"When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action. This is fully illustrated by the case from Salkeld and Modern, in which a plaintiff, having previously recovered

for an assault, afterwards sought indemnity for a very serious effect of the assault, which could not have been anticipated, and of consequence could not have been compensated in making up the verdict.

"The cases are numerous and conclusive on this doctrine. As long ago as the 20th Eliz. (Cro. Eliz. 53), this was one of the points ruled in the *Sheriffs of Norwich v. Bradshaw*. And the case was a strong one; for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Battery v. Faulkner*, 3 B & Ald. 288, was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In the case of *Short v. McCarthy*, which was assumpsit against an attorney, for neglect of duty, the plea of the statute was sustained, though the proof established that it was unknown to the plaintiff until the time had run out. And the same point is ruled in *Granger v. George*, 5 B.&C. 149; in both cases the court intimating that, if suppressed by fraud, it ought to be replied to the plea, if the party could avail himself of it. In *Howell v. Young*, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury."

A leading case in point is *Aachen and Munich Fire Insurance Company v. Morton*, *supra*. There the complaint was for wrongful assignment of a policy of insurance in breach of an express agreement to deliver the same to the insurance company forthwith. On February 28, 1898, a notice was given to the hotel company by Graham, a mortgagee, of his intention to cancel the fire insurance policy with defendant. The policy was claimed to be lost and therefore not delivered to the fire insurance company. On July 10, 1898 the hotel was destroyed by fire. On January 13, 1899 the policy which had subsequently been found was assigned by the mortgagee to one, Stone, and two days later Stone sued for the proceeds under the policy and ultimately recovered judgment in 1902 against defendant. Defendant then sued in 1906 against Graham's administrator. The applicable Statute of Limitations was six years and

the Court held that it ran from the date of the wrongful assignment, and not from the time a judgment was recovered against the defendant. The Court stated:

"If an act occur, whether it be of breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence."

In Gould v. Palmer, 96 Ga. 798, 22 S.E. 583, it was held that it was not the special damage or injury resulting from the unskillfulness of an attorney but the breach of duty imposed by the contract of employment which gives a right of action for damage sustained; and the Statute of Limitations in such a case, therefore, runs from the date of the breach of the duty and not from the time when the extent of resulting injury is ascertained.

And, similarly, the rule is stated in Gogolin v. Williams, 91 N.J. Law 266, 102 A. 667, 668:

"It is to be observed that the gravamen of the action is the hiring of a professional man to perform a service, within the line of his profession, which he negligently performed to the damage of the person employing him. In such a situation, quite uniformly, the rule has been declared to be that the Statute of Limitations begins to run from the time of the occurrence of the breach of duty, and not from the time of the discovery of actual damage, as a result of such breach."

Accord: H. P. Cummings v. Marbeloid Co., 1931, 3d Cir., 51 F. 2d 906; Corporation of the Royal Exchange Assurance v. United States, 1935, 2 Cir., 75 F. 2d 478; Pickett v. Aglinsky, 1940, 4th Cir., 110 F. 2d 628.

When plaintiff was notified by Lumbermens that his policy did not cover the Nicholson accident, his cause of action against Mutual and Kroll accrued for an alleged breach of duty to provide the requested coverage and a suit in negligence against them or for reformation against

Lumbermens could have been instituted. It is immaterial that the full extent of his damage would not be known until after the Nicholson settlement, for as the Supreme Court stated in Wilcox, referring to Battery (as quoted supra):

"* * * for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known, yet it was held that plaintiff should have instituted his action, and he was barred for not doing so."

Plaintiff had available two courses of action to preserve his remedies sought here. He could have settled the Nicholson suit which was instituted on March 17, 1958, had his damages determined and filed suit in the Court below before the running of the statute on January 18, 1959; or, he could have filed suit here on or before January 18, 1959 and his "proof of actual damage [could] extend to facts that occur or grow out of the injury, even up to the day of the verdict". Wilcox, supra. The consent judgment in the Nicholson suit on May 5, 1959 (appellant's brief, p. 5) would certainly have preceded a jury verdict in a suit filed in the Court below on January 18, 1959.

Accordingly, plaintiff had ample time and opportunity to pursue his remedies before January 18, 1959 but failed to do so. This was fatal.

II

**In the Suit for Reformation the Facts Which
Constituted the Alleged Mistake Were Known for
About Four Years Prior to the Filing of this Action,
And Therefore Plaintiff Is Guilty of Laches.**

It is not disputed that the deficiency in plaintiff's policy was discovered by him at the very latest when he received Lumbermens' letter of disclaimer on January 18, 1956, to which he replied two days later (J.A. 21, 22). Therefore, it follows that plaintiff could have maintained his action for reformation immediately after Lumbermens disclaimed coverage. Plaintiff, however, indicates in his brief that no action for

reformation could have been maintained until after the consent judgment in Maryland was entered in favor of John Nicholson even though the facts on which the reformation suit would be founded were known at least in January of 1956. On the contrary, the cause of action accrues and the Statute of Limitations begins to run when the facts which constitute the mistake are discovered, or should have been discovered by the use of due diligence. George v. Ford, 1911, 36 App. D.C. 315; 45 Am. Jur. §84, p. 636. If there is no applicable statute, Courts have wide discretion in determining whether or not the right to reform an instrument should be granted, but in cases of concurrent jurisdiction Courts of Equity will hold themselves bound by the Statute of Limitations that would govern an action at law upon the same demand. The Washington Loan & Trust Company v. Darling, 1903, 21 App. D.C. 133; Cassell v. Taylor, 1957, 100 U.S. App. D.C. 153, 243 F. 2d 259. In Cassell, this Court stated on p. 261, 243 F. 2d:

"* * *. In those instances where the Court has concurrent jurisdiction to grant either equitable or legal relief in the enforcement of the asserted obligation, equity follows the law and the equitable remedy will be withheld if the local statute of limitations would bar the concurrent legal remedy. Cope v. Anderson, 1947, 331 U.S. 461, 67 S. Ct. 1340, 91 L. Ed. 1602."

In an early decision decided by this Court involving the question of the application of the Statute of Limitations in equity proceedings, in The Washington Loan & Trust Company v. Darling, supra, this language appears at p. 140, 21 App. D.C.:

"The doctrine has been too long established to require citation of authority, that in cases of concurrent jurisdiction courts of equity will hold themselves bound by the statute of limitations that would govern an action at law upon the same demand; and where the subject-matter of the demand is one ordinarily cognizable at law, but, by reason of special conditions, the remedy for its enforcement in the particular case is obtainable solely in equity, the bar of limitation will be applied, either in obedience to the statute, or by analogy, in the same way as at law.

"Upon obvious grounds, equity follows the law in all such cases; and for the same reason that it will apply the bar to the enforcement of the demand in accordance with the rule of the statute, it will, ordinarily at least, refuse to apply the bar of laches on a delay of less duration. Conceding that a court of equity may not consider itself absolutely bound to apply the rule of the statute in all cases of the kind, yet, at the very least, there must be something extraordinary in the special circumstances of a particular case to justify the denial of relief, on the ground of laches, when by the terms of the statute there could be no bar in a corresponding action at law."

Where the rights of the parties have not been varied by a lapse of time and are ascertainable – in other words, where only lapse of time is to be considered – Courts of Equity are bound equally with Courts of Law to apply the Statute of Limitations. Stansbury v. Inglehart, 9 Mackey (20 D.C. 134), appeal dismissed 1894, Inglehart v. Stansbury, 151 U.S.68.

In the admissions filed in this case, plaintiff admits (J.A. 19, 23):

"No. 4 – Plaintiff admits there was no subsequent correspondence or communication otherwise between plaintiff and any of the defendants which in any way modified, altered or changed the Insurance Company's position with respect to its disclaimer of coverage as set forth in its letter dated January 16, 1956.

"No. 5 – There has been no suit or other proceeding instituted against defendants Mutual Insurance Agency, Inc. or John H. Kroll involving the policy of insurance attached to the complaint prior to the filing of the action herein on January 12, 1960."

Accordingly, the Court found that plaintiff's delay in not seeking reformation for a period of about four years constituted laches and, therefore, judgment was entered for defendants on this Count.

CONCLUSION

The causes of action against Mutual and Kroll accrued more than three years prior to the institution of this suit, and the policy of the law to bring repose was given effect by the lower Court's entry of judgment for these defendants. It is submitted that the judgment of the lower Court was correct and should be affirmed.

Respectfully submitted,

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